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Assessing the UK's Pre-emptive and Preventative
Measures of Countering Terrorism, Interaction with
Article 5 and 6 of the European Convention on Human
Rights, and the Potential Role of Risk Assessment*

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RISK ASSESSMENT, COUNTER-TERRORISM LAW & POLICY;
A HUMAN RIGHTS-BASED ANALYSIS:

Assessing the UK's Pre-emptive and Preventative Measures of
Countering Terrorism, Interaction with Article 5 and 6 of the
European Convention on Human Rights, and the Potential Role of
Risk Assessment

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ABSTRACT

The terrorist attacks of September 11th 2001 had a significant impact upon how governments counter terrorism. The UK introduced and implemented an array of measures, each taking a pre-emptive and preventative approach, to tackle terrorism. The change in counter-terrorism law and policy post-9/11 has, as this thesis will show, increasingly become reliant upon fear-based risk and uncertainty rather than evidence-based guilt.

This thesis will examine some of those UK measures used post-9/11, which were seen as some of the more controversial measures. When analysing each measure there will be an assessment of the human rights issues associated with those measures, specifically under Article's 5 and 6 of the European Convention on Human Rights. The assessment of these rights with each measure will provide a legal understanding of the wider academic and legal implication of those measures, these include the right to a fair trial.

Having assessed the human rights implications of each measure, a risk assessment is undertaken. This enables further analysis of each measure and holistically identifies the wider risk implications of such counter terrorism measures. Such risks may include negative perceptions of the police, the UK or provide indirect support for the radicalisation of new terrorists.

This process is developed within the thesis and becomes known as the 'tri-relationship'. Throughout, the measures examined will be seen to erode those human rights principles ordinarily guaranteed by the criminal justice system, for example liberty. Instead, the measures give way to a new counter-terrorism justice system which has become increasingly normalised by the measures introduced and accepted by the courts. This is despite the implications on human rights and risks involved. This thesis will show that the measures introduced by the UK to achieve securitization, fail to achieve the long-term protective aims of the UK Counter-Terrorism Strategy.

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DEDICATION

I wish to dedicate this thesis to my family: mum, dad, Ross and Kendra. The support from you all over the last few years has made completion of this thesis possible. You have been a source of strength, for which I am eternally grateful.

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INTRODUCTION

"Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety".

– Benjamin Franklin¹

The September 11 terrorist attacks (henceforth '9/11') have significantly changed the attitude of many on how to deal with counter-terrorism, none more so than the United States of America for whom it became a 'sudden realization of the threat' (Weisburd et al, 2010:725).² 9/11 subsequently resulted in prolonged debate on how best to tackle terrorism; the then United States President George W. Bush argued that "if we wait for threats to fully materialize, we will have waited too long...we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge".³ Similarly, the former British Prime Minister, Tony Blair MP, maintained that the Government was desperate to avoid situations where people could say "if you'd only been vigilant as you should have been, we could have averted a terrorist attack".⁴ This discourse paved the way to adopting a stronger strategy of pre-emption and prevention in both countries. This thesis will concentrate primarily on the manifestations of that strategy in the UK through its measures to tackle terrorism.

Pre-9/11 the then Labour UK Government (henceforth 'the former Labour UK Government') had completed its assessment of UK terrorism laws and policies shortly after it came to power in 1997. As a result, it introduced the Terrorism Act ('TA') 2000 which was intended to be the consolidation of all UK terrorism laws; it was to provide an established regime which would stop the government and parliamentary cycle of introducing emergency laws following a recent terrorist atrocity (Walker, 2006: 1142). The introduction of the TA 2000, one may argue, signified a turning point for the UK generally when the former Labour UK Governments' decision to: become more intrusive into the lives of citizens and affect their

¹ Gerard Chaliand and Arnaud Blin 'The History of Terrorism from Antiquity to Al Qaeda' (University of California Press 2007) 419.

² David Weisburd, Badi Hasisi, Tal Jonathan and Gali Aviv (2010) 'Terrorist threats and police performance: a study of Israeli communities' 50(4) British Journal of Criminology, 725-747.

³ Jude McCulloch and Sharon Pickering (2009) 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'' 49 British Journal of Criminology, 628-645, 630.

⁴ McCulloch and Pickering (fn 3) 632. Also see Frederick John Desroches 'Policing in the Post 9/11 Era' 2005 Research and Evaluation Branch (Royal Canadian Mounted Police).

day-to-day activities more profoundly; and empowerment of the state at times of national emergency. However, the TA 2000 faced its first challenge when the 9/11 terrorist attacks occurred and was considered, by the former Labour UK Government, to be insufficient to deal with the new terrorist threat. Thus the perception arose that the UK was required to re-shape its counter-terrorism strategies, moving towards a trend of pre-emptive security that was already spreading in Western countries⁵ (Agamben, 2005; Dershowitz, 2006; Ericson, 2007). The former Labour UK Government enacted more counter-terrorism legislation and provisions to support the TA 2000, starting with the Anti-Terrorism, Crime and Security Act ('ATCSA') 2001, then the Prevention of Terrorism Act ('PTA') 2005 and the Terrorism Act ('TA') 2006. This thesis will focus on some of the more controversial aspects of UK counter-terrorism measures used post-9/11. Specifically these are:

- (i) Section 44 stop and search under the Terrorism Act (TA) 2000 (henceforth 's44');
- (ii) The Control Order regime as enacted by the Prevention of Terrorism Act (PTA) 2005;
- (iii) The Deportation with Assurances (henceforth 'DWA') which is an immigration counterterrorism measure; and
- (iv) The Terrorism Prevention and Investigation Measure scheme and the Enhanced Terrorism Prevention and Investigation Measure scheme (henceforth 'TPIMs' and 'ETPIMs' respectively), which replaced the control order regime.

It is argued by Fenwick (2010) that a significant aspect of the 'war on terror' following 9/11 in the UK was the shift from 'a wholly criminal justice response under the Terrorism Act 2000 to the creation of a parallel preventative system running in tandem with the continuing criminal justice one, a system that does not rely on the commission of criminal offences or on adherence to ordinary criminal justice safeguards'.⁶ This parallel preventative system may be best labelled as a 'counter-terrorism justice system'. Fenwick (2007) suggests that this action is a typical UK counter-terrorist response by being using '...over-broad and arguably counter-productively draconian proactive measures...'.⁷ In contrast, Lord Carlile QC (2011b)⁸ openly remarked that terrorism should not be dealt with in the same way as ordinary crime

⁵ Louise Amoore and Marke de Goede 'Risk and the War on Terror' (Routledge 2008), 57.

⁶ Helen Fenwick (2010) 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the 'War on Terror'?' *Current Legal Problems*, 63(1): 153-234, 153.

⁷ Helen Fenwick 'Civil Liberties and Human Rights' Fourth Eds. (Routledge-Cavendish 2007), 1332.

⁸ Lord Carlile QC of Berriew, (2011b) speaking at the English Law Student Association Seminar, University of Durham (8th February).

due to the nature of terrorism, therefore supporting pre-emptive and preventative action. Pre-emptive and preventative measures began to form a greater part of the former Labour UK Governments' strategy, as reflected in the former Home Secretary's opinion following the Madrid train bombing: 'the norms of prosecution and punishment no longer apply'.⁹ Arguably, this became the former Labour UK Governments' admission that new counter-terrorism measures would not fully comply with the ordinary application of due process, including the presumption of innocence, the right to a fair trial and to be heard by an independent and impartial member of the judiciary. In fact the new measures tended, this thesis will argue, to breach human rights' standards at national and European level. Fenwick (2007: 1329) suggests that 'proactive measures are clearly more risky and pernicious in human rights terms...'¹⁰

The former Labour UK Government increased state control over suspects; they also provided extended powers for the police, including greater stop and search powers and powers to detain suspects for longer periods without charge. This formed part of the state's intelligence and evidence gathering exercises. Further to this, some of those against whom the state could not gather sufficient evidence would become subject first to Part IV ACTSA ('Part 4'), and then to controversial 'Control Orders', which could also form part of intelligence and evidence gathering, due to the use of increased surveillance. This has subsequently been replaced by TPIMs and ETPIMs. In recent years such powers have been labelled as failing strategies and are deemed by human rights campaign groups such as Liberty, as 'unsafe and unfair',¹¹ whilst others, such as Warbrick (2012), view a number of these newer powers enacted post-9/11 as conflicting with rights under the European Convention on Human Rights (henceforth 'ECHR') in a 'potentially unjustifiable fashion'.¹²

THEMES OF THIS STUDY

This thesis will examine the main features of current pre-emptive and preventative counter-terrorism strategies, in particular stop and search, detention, deportation, control orders and TPIMs and ETPIMs; their use in gathering intelligence and evidence. The reason for this is

⁹ Jessica Wolfendale (2007) 'Terrorism, Security, and the Threat of Counterterrorism', *Studies in Conflict and Terrorism*, 30: 75-92, 75.

¹⁰ Fenwick (fn 7) 1329.

¹¹ Liberty, 'Unfair Unsafe Campaign' <<http://www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php>> accessed 5th January 2011.

¹² Colin Warbrick 'The principles of the European Convention on Human Rights and the responses of states to terrorism' 2012 *European Human Rights Law Review*, 287. Also see: Fenwick (fn 7) 1335.

that, as noted by McCulloch and Pickering (2009), intelligence gathering which can be gathered coercively 'involves a process of bringing a vast body of information, often meaningless in isolation, together in the hope of discerning links and underlying patterns that...create a meaningful picture'.¹³ Also this thesis will identify the contradiction between use of those mechanisms of counter-terrorism rather than the use of the criminal justice systems to prosecute. Collectively this will facilitate in the primary assessment of whether such counter-terrorism measures achieve the UK governments policy aims of 'Pursue, Prevent, Protect and Prepare' as outlined under the current UK Strategy 2011.¹⁴ Throughout this process of assessment consideration of the risks of pre-emptive and preventative measures in counter-terrorism, such as: the loss of human rights credibility; alienation of communities; provision of perceived evidence supporting radical propaganda which assist terrorism and contribute to a breakdown of trust between communities and the state (Fenwick, 2011: 3). Each of these processes of analysis will enable the assessment of the relationship between risk, the counter-terrorism pre-emptive and preventative measures and human rights as guaranteed by the criminal justice system. These three components create what this thesis labels the 'tri-relationship', each being interlinked to one another (see diagram 1 below) which this thesis will use to establish the main arguments.

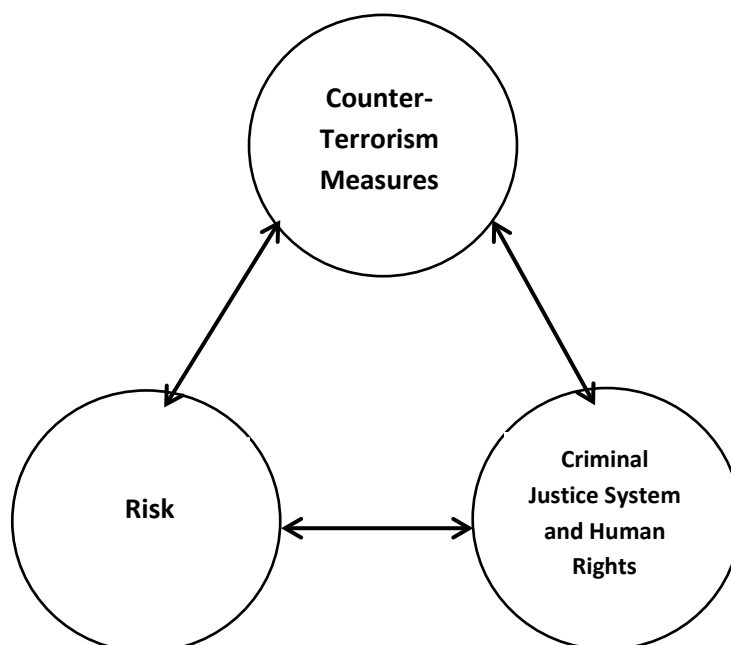


Diagram 1: Tri-relationship

¹³ McCulloch and Pickering (fn 3) 634.

¹⁴ HM Government (2011) 'CONTEST: The United Kingdom's Strategy for Countering Terrorism', (July) Cm 8123. Whilst the policy has been updated since 2011, the key aims of Pursue, Prevent, Protect and Prepare have remained consistently the same throughout subsequent strategies.

It is anticipated that this thesis will show that as preventative measures are implemented and used, there will be evidence, or risk, of abuse and manipulation by the state and/or emanations of the state (eg the Police). This consequently increases the risk of dividing society, fostering segregation and contributing to a climate of fear. It is suspected that current preventative measures create a divide which enhances negative perceptions of cultural and ethnic groups, thus creating 'suspect communities' (Greer, 2010: 1171; Fenwick and Choudhury, 2011). These communities and their supporters will in turn tend to become segregated from mainstream British society. It is suggested that the limited judicial involvement in the use of proactive counter-terrorism measures is due to the state's concerns relating to assessment of risk, and the preferred option of managing and controlling 'suspects' based on associative and situational suspicion; these being questionable intelligence-led assessments rather than being evidence-based that could be presented in a criminal trial, thereby avoiding the need to present security service material for scrutiny. This thesis will argue that further safeguards should be implemented within counter-terrorism statutory and policy frameworks in order to protect human rights and reduce the risks caused by those measures, including: greater independent involvement of the Judiciary; transparency within the measures used; improved accountability; and realignment with the criminal justice system. Consequently, if there is a failed rebalance between national security, human rights and risk British citizens face a harsh choice between national security or human rights. Preference for national security is likely to result in further erosion of human rights and the high regard that is given to the UK due process under the criminal justice system, allowing only basic human rights standards and giving rise to a new 'counter-terrorism justice system'.

To assess this, this thesis will first consider the circumstances surrounding an individual subjected to stop and search under s44 of the TA 2000. Then consideration will be given to those who are placed on control orders, followed by other measures to detain and manage terrorist suspects such as deportation. Individually and collectively the measures examined will show, it is believed, a trend which moves away from the use of the 'traditional criminal justice system', creating a new 'counter-terrorism justice system'; giving support to Gearty (2006) who identified a 'criminal justice model' and a 'counterterrorism model' (2006: 125). This alternative creates a number of human rights concerns and risks, both for the state and individual suspects. It will be argued that the alternative system or the counter-terrorism system provides: a lack of or limited judicial involvement; a reduction in safeguards to

support human rights, particularly Articles 5 and 6 of the ECHR; is politically driven with the Home Secretary at the helm; and operates on the grounds of suspicion that may be circumstantial supported by ambiguous information not evidence based. This thesis does not assess the HRA 1998 relationship as the courts are required to interpret the ECHR into national law, although the application and importance of human rights to the counter-terrorism debate is relevant. Chapter One will assist in the understanding of the general themes that will re-occur within this thesis, specifically the characteristics of pre-emptive and preventative measures and its relationship with UK counter-terrorism generally. This is achieved by looking at the developments and trends identifiable from laws and policies introduced to counter-terrorism post-9/11 and in particular following the 2005 July 7 London Bombings (henceforth '7/7').

Chapter One will consider the various models used in relation to counter-terrorism and their application to current counter-terrorism strategies. This will provide greater understanding and identification to some of the trends and concerns regarding human rights and risk whilst discussing counter-terrorism measures in subsequent chapters. The findings of this chapter will support this thesis in considering the role of risk assessment when examining counter-terrorism measures in subsequent chapters, determining whether they support intelligence and evidence gathering which may assist the UK in detecting, investigating, disrupting and prosecuting terrorism (UK Strategy, 2011: 10). It will also aid in scrutinising the relationship between risk and human rights when applied to the measures being considered. The conclusion will consider the model adopted by the UK, which underpins many of the counter-terrorism measures which this thesis will be considering. The underlying reasons for adopting such strategies will be considered and related back to the general trend of adopting pre-emptive and preventive measures post 9/11.

Chapter Two will specifically examine emergency stop and search powers under s44 TA 2000 and the main themes which are identified from Chapter One. Chapter Two will show that emergency stop and search powers, such as those under s44, have a number of consequences, including: ordinary policing becomes complex and intertwined into countering terrorism; negative perceptions of the police develop; and these measures are open to abuse. The powers under s44 may arguably form part of intelligence and evidence gathering operations of the state to either secure conviction against or detain terrorist suspects, however

it will be argued that this measure of countering terrorism limits the states opportunity to obtain such information. The s44 powers have been held as a breach of Article 8 ECHR by the European Court of Human Rights (henceforth 'ECtHR') in *Gillan and Quinton v United Kingdom*.¹⁵ In order to assess these issues, this chapter will need to consider whether s44 develops or creates and exacerbates a difficult relationship between the police and the community? Whether such powers are an effective pre-emptive and preventative measure of countering terrorism? Were these powers enforced effectively? Are such powers open to abuse and, if so, to what extent? Ordinary powers of stop and search form part of the criminal justice system process; can the same be said for those powers under s44? Do such emergency powers cause greater harm than those they are supposed to avert and do they appear to contribute to increasing the risk of terrorist incidents?

In order to answer these relevant questions, which assist in identifying issues of risk, there will be an assessment of the measures related to risk and consideration of statistical data provided by the Home Office. There will also be an examination of the *Gillan and Quinton* case¹⁶ and the ECtHR decision that there was a breach of Article 8 ECHR. Whilst it was decided that Article 8 ECHR had been breached, it is important to consider the human rights and risks identified by the ECtHR and consider whether such conclusions are applicable when considering Article 5. Consideration will be given to the 'suspect profile' of who a terrorist is and whether and to what extent the police may use this to enforce emergency powers provided by counter-terrorism legislation. It is noteworthy that as a consequence of the *Gillan and Quinton* case and following the 2011 Report by Lord MacDonald (henceforth 'the MacDonald Report, 2011'), the former coalition UK government repealed the s44 measure under the Terrorism Act 2000 (Remedial) Order 2011.

Based on the recommendations made under the MacDonald Report (2011) the former coalition UK government changed the police powers to stop and search suspected terrorist under the Protection of Freedoms (PoF) Act 2012;¹⁷ the extent of the recommendations and the use of the Act to reform counter-terrorism stop and search powers will be considered in more detail in Chapter Two. It is envisaged that there will be little change in the way police form their suspicions or in relation to the use of powers to stop and search suspected

¹⁵ *Gillan and Quinton v United Kingdom* [2010] Crim LR 415; 28 BHRC 420; [2010] ECHR 28; (2010) 50 EHRR 45 (Application No. 4158/05).

¹⁶ *Ibid.*

¹⁷ Protection of Freedoms Act 2012 Part 4, Section 59.

terrorists. It will be argued that the police will continue to assess the risk posed by suspected terrorists on circumstantial or minimal intelligence rather than on evidence, resulting in a distorted balance between the prevention of terrorism and due process. As a consequence it will be shown that this type of pre-emptive measure is best utilised when the threat of terrorism is believed to be imminent. It will be suggested that the reason for this is because preventing terrorist activity through measures like s44, will create a lost opportunity to gather intelligence and evidence to subsequently identify and convict terrorists; this will be an issue that will be seen throughout this thesis.

Chapter Three will discuss the Control Orders regime which operated between 2005 and 2011. The regime replaced an earlier indefinite detention without trial power, as enacted under Part 4 ATCSA 2001. Part 4 ATCSA will not be considered due to the extensive literature already available on the subject (eg Fenwick, 2007). The chapter will consider the regimes relationship with the ECHR, focusing on Articles 5 and 6 ECHR (the Right to Liberty and Security and the Right to a Fair Trial respectively). It will consider the two forms of control orders, derogating and non-derogating, although it will focus on the latter as the former had never been activated during the course of the regimes lifetime. Under the regime obligations could be imposed by the regime against the terrorist suspect, also known as the 'controlee', which will be shown as being excessive. The relationship between the regime as a preventative counter-terrorism measure with Articles 5 and 6 ECHR can be considered, with risk assessment being used to conduct an extensive examination of the measure. The key questions for Chapter Two, particularly when considering the obligations that can be imposed, is whether the regime was proportionate to the risk allegedly posed by the suspect.

Non-derogating control orders are controversial and have been challenged in the courts in the UK; they have been described by Lord Carlile QC as 'inhibit[ing] normal life considerably'¹⁸ which would be considered to be a serious understatement by Ewing and Tham (2008: 674). Control orders were believed to create a number of risks, including: isolation with resultant mental health issues for the controlee; victimisation or segregation for the family of the controlee; provide propaganda and support to terrorist campaigns by providing negative perceptions of the UK. Furthermore, it will be argued that the lack of safeguards under the

¹⁸ Lord Carlile QC of Berriew 'Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (19th February, 2007a) <<http://www.statewatch.org/news/2007/feb/uk-pta-carlile-ann-report.pdf>> accessed 29th May 2011.

regime, such as the lack of or minimal independent judicial involvement throughout the process, strengthened the argument that the use of this counter-terrorism measure was abused by the state, consequently jeopardising the UK's moral standing in terms of human rights' principles.

Chapter Three will consider whether control orders were an effective way of preventing terrorism by considering the risks the measure posed; giving consideration to what extent could the control order regime have caused harm to national security? There will be an examination of the suggestions made by others, such as professionals and academics, on ways the control order regime could have been improved; more specifically, there will be an assessment of whether the use of bail as an alternative could be used to achieve the same aims of the regime and the Strategy 2011. Consideration to the recommendations provided by Lord Carlile QC, the former Independent Reviewer of Anti-Terrorism Laws, and Lord MacDonald following the MacDonald Report (2011) will assist in determining whether the regime was proportionate in balancing between national security and human rights. This will also be achieved by analysing some case studies and relevant case law, including *AP v Secretary of State for the Home Department*¹⁹ and *AF v Secretary of State for the Home Department*,²⁰ allowing an extensive discussion of what constitutes deprivation of liberty and failures of due process. The chapter will seek to evaluate the risks created and addressed by measures such as control orders.

Chapter Three will formulate strong arguments for the removal of the control orders regime. Within the thesis it will be recognised that the UK is unable to convict all terrorists due to concerns of having to divulge security sensitive material, an alternative process will be considered that operates in a similar way to the regime but is in line with criminal justice standards, namely the process of bail. This assessment will be supported by the examination of the risks involved, including the risks to the controlee, the state, and the courts. It is noteworthy that the regime under the PTA 2005 was repealed as a response to *AF*, as indicated under recommendations of the MacDonald Report (2011). As a consequence of this, the arguments supporting the removal of the regime will be used to examine some of the features of the replacement scheme known as TPIMs and ETPIMs, which replaced the

¹⁹ *Secretary of State for the Home Department v AP* [2011] 2 AC 1; [2010] UKHRR 748; [2010] 3 WLR 51; [2010] UKSC 24.

²⁰ *AF v Secretary of State for the Home Department* [2009] UKHL 28; [2008] EWCA 1148.

control order regime from January 2012. This will support the detailed analysis and assessment of TPIMs and ETPIMs in Chapter Five, as well as support this thesis assessment of whether current UK counter-terrorism measures support the UK governments aims outlined under the Strategy 2011.

Chapter Four will look at other forms of pre-emptive and preventative measures used in counter-terrorism post-9/11 in the UK. Having examined the main features - s44 and control orders - it will be possible to look at other measures and identify their effectiveness in balancing national security with individual human rights. Specifically, Chapter Four will look at the use of the executive decision to deport terrorist suspects. The assessment of DWA will help test the tri-relationship model of discussion when considering the link between counter-terrorism measures, risk assessment and the criminal justice system. Unlike the other counter-terrorism measures which deal with aspects or adaptations of criminal justice process (eg police stop and search), this measure adopts the immigration system as a way of achieving the aims of the Strategy 2011.

The counter-terrorism measure DWA has been developed post 9/11, compared to the control order regime which was introduced following a previously failed measure as mentioned earlier. The DWA measure is pre-emptive and preventative, thus similar to s44 and the control order regime in terms of its natural characteristics. DWA has been under public scrutiny and regularly reported upon due to the legal challenges by suspects, specifically *Omar Othman (aka Abu Qatada) v Secretary of State for the Home Department* (henceforth 'Abu Qatada').²¹ In this chapter there will be discussion of the legal challenges brought by Abu Qatada and the House of Lords unanimously ruling in favour of the UK's practice of deporting terrorist suspects to countries, including those with poor human rights records, so long as they had signed a 'Memorandum of Understanding' (henceforth MoU). The British Ambassador, James Watt, believes that the practice of deporting with assurances guarantees security "whilst maintain[ing] and upholding the human rights principles".²² Although the assessment of this measure when using the tri-relationship model will show that UK credibility in relation to protecting a person's Article 3 ECHR rights (Prohibition on torture

²¹ *RB (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

²² James Watt, Former British Ambassador <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=13821064>> accessed 11th May 2011.

and inhuman or degrading treatment or punishment) is damaged; a risk in itself one would argue.

Although this counter-terrorism measure has been vilified, it is a measure which it is believed will prove to be worthwhile dependent upon clearer reforms of the mechanism (Walker, 2009a: 306). The MacDonald Report (2011) indicates that the system of DWA is an acceptable practice, particularly if there is no evidence suggesting that those deported are in danger of being tortured or suffering inhumane treatment. However, whilst the Report condones the use of DWA it concedes that it is a difficult, long and costly process to obtain assurances with other jurisdictions that are known or believed to engage in the abuse and mistreatment of people. Although, the Report suggests that that access to the courts provides suspects with 'clear reassurances that their rights are appropriately respected during the deportation process';²³ recommending the extension of the process due to its success. However, by exploring the legal challenges by Abu Qatada it will be possible to demonstrate the risks of the DWA measure and the importance of independent judicial involvement when a person faces a 'real risk' of harm of their Article 3 ECHR rights being breached.

By examining the development of the DWA measure through the assessment of case law, it becomes possible to identify any other dominant trends within UK pre-emptive and preventative counter-terrorism measures that may not have been identified in the previous chapters. Similarly, the assessment of risk will assist in the identification of any dominant trends of risk. One of the risks that will be identified is the negative impact upon the UK's reputation and credibility. Just as the control order regime was introduced, it will be concluded that the DWA measure was developed to correct the House of Lords findings in *A and Others v Secretary of State for the Home Department*²⁴ (also known as the 'Belmarsh case') providing the UK government a solution to deal with foreign terrorist suspects that cannot be prosecuted without exposing national security intelligence. It is likely that such UK counter-terrorism measures will continue to show a trend towards avoiding utilisation of the criminal justice system, or at the very least, limiting its involvement. As seen within the UK Strategy 2011 and the MacDonald Report (2011), counter-terrorism measures are intended to be realigned with the criminal justice system, and intended to increase the ability to increase

²³ MacDonald Report 'Review of Counter-Terrorism and Security Powers: A Report by Lord MacDonald of River Glaven QC' 2011 Cm 8003, 9: 7.

²⁴ *A and Others v Secretary of State for the Home Department*; *X and Another v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

the prosecution of terrorist suspects. A further risk that will be explored is the risk that DWA removes or reduces the UK's ability to manage and control the threat posed by terrorists, caused by sending the suspect to another jurisdiction within which the UK has no power. This will also significantly reduce the UK's ability to gather evidence and intelligence to tackle terrorism, both of these consequences fall outside of the UK Strategy (2011).

Following on from discussions in Chapter Three, Chapter Five will discuss the TPIMs and ETPIMs scheme's which replaced the control order regime in January 2012. The discussions from Chapter Three and the recommendations of counter-terrorism reviews will assist in an accurate and detailed assessment of the new schemes. This will enable the identification of what effect these measures will have on human rights, the relationship with the criminal justice system in the governments endeavour to secure conviction and the role of risk assessment. There are various suggestions proposed by the government, academics and Parliamentarians, including the Joint Committee on Human Rights, explaining how best to improve the measures like control orders and TPIMs/ETPIMs. However, various sources such as Hansard provide evidence that TPIMs and ETPIMs is not dissimilar to the former control order regime, in fact some may deem them to be one in the same save for the name (Walker, 2013). It is likely to be found that the new schemes will restrict human rights and raise similar risks as those identified in previous chapters, for example Chapter Five will examine the risks of the state losing the opportunity to gather evidence and intelligence. It is important however to identify what significant differences there are and whether and how far they deal with the risks raised previously from Chapter Three. It is expected that whilst the new schemes are more closely aligned to the criminal justice system compared to the former control order regime, it remains separate to the criminal justice system and the protections offered therein and consequently strengthening the development of a new counter-terrorism system. Ultimately Chapter Five will recognise the risk of adopting a counter-terrorism system and practices, which are separate to those provided by the criminal justice system, and the risk of such becoming normalised; this will assist in wider discussion of this risk in Chapter Six.

In Chapter Six, the conclusion of the thesis, the wide range of sources will be re-focused in order to re-consider the concerns raised by the implementation of pre-emptive and preventative counter-terrorism measures in each chapter. It will answer the main question of

this thesis: does pre-emptive and preventative measures support the government in its aims as set out under the Strategy 2011, including:

- (i) the detection of terrorist-related activity;
- (ii) the collection of intelligence and evidence; and
- (iii) the prosecution of terrorists.

Drawing upon the findings of each previous chapter, Chapter Six will consider whether a balance can be achieved between national security and human rights, in doing so identify which model is more successful: a unique model within an emergency process or the criminal justice and human rights approach model. Through the use of the tri-relationship discussions a balance is required; however, greater preference for the safeguards provided by the criminal justice system should be favoured, otherwise a newly developed counter-terrorism justice system would be open to political influence, reduction in the respect for human rights and increased risk to UK national security.

CHAPTER ONE
THE DEVELOPMENT AND TRENDS OF COUNTER-TERRORISM IN
THE UK POST-9/11: THE KEY ISSUES AND THEMES OF THIS
THESIS

INTRODUCTION

Terrorism is not a new phenomenon; its existence has been seen throughout history and during periods of conflict. Terrorism is considered a technique as old as warfare (Chaliand and Blin, 2007: 5) and as such requires strategic methods to prevent, if not reduce, the devastating consequences terrorist attacks may inflict, including risks to life and serious injury. Since 9/11 the UK has taken a clear strategy of 'Pursue, Prevent, Protect and Prepare'.²⁵ In partial pursuit of that strategy, the UK government has placed greater emphasis on the use of detention, where evidence is presented by the security services of 'suspected' terrorists or those 'suspected' of being linked to terrorist-related activity. Under Part 4 of the now repealed ATSCA 2001, suspect terrorists were detained indefinitely without being informed of the grounds on which their detention was based and with little or no prospect of a trial. This was an extreme measure of which Britain has used on two occasions in the 20th century, the First and Second World Wars (Ewing and Tham, 2008: 668). On both occasions legal challenges arose (*R v Halliday*²⁶ and *Liversidge v Anderson*);²⁷ both of which were unsuccessful as the House of Lords favoured security over civil liberties.

This thesis will show that the courts have attempted to maintain a balance between security and human rights' standards. This has resulted in the government introducing further restrictive measures, which Zedner (2007b) describes as causing the criminal justice system to become a victim caused by the success of the courts; in other words, due to the decision of the court in the *Belmarsh* case the government enacted new measures to counteract the decision. Under the previous strategy introduced post-9/11 by the former Labour UK

²⁵ Home Office, Foreign & Commonwealth Office, Cabinet Office and Ministry of Justice 'Protecting the UK against terrorism' (26th March 2013) <<http://www.homeoffice.gov.uk/counter-terrorism/uk-counter-terrorism-strat/>> accessed 11th May 2011.

²⁶ *R v Halliday* [1917] AC 260.

²⁷ *Liversidge v Anderson* [1942] AC 206.

government,²⁸ terrorism was tackled by means of strengthening its pre-emptive and preventative measures. Unlike previous acts of terrorism, such as during World Wars I and II and the IRA attacks, terrorism has, it has been argued, become increasingly about uncertainty; playing on randomness, anticipation and disestablishment (Ericson, 2008: 58-60). Current acts of terrorism tend to be secretive, well planned and developed to have great impact, as demonstrated by the 7 July London Bombings ('7/7').

The earlier preventive strategy appeared to be a response to a perception that Islamic extremist terrorism is of a different nature from previous forms of terrorism (Fenwick, 2011). It is argued that the pre-emptive and preventative measures employed are in conflict with the ECHR (Warbrick, 2008). This may be as a result of the measures being either inadequate or abusive in their aim of dealing with terrorism which, as explained above is viewed as especially random and unpredictable. For example, the TA 2000 did not generally adopt a preventative strategy but instead a punitive one (which nevertheless had pre-emptive elements) and was viewed as an inadequate response to deal with terrorism post-9/11. Part 4 ATSCA 2001 was predominately preventative and repealed because it breached human rights. This suggests that the more sophisticated and unpredictable terrorism becomes, the more repressive the measures that the UK government is likely to introduce which consequently conflict with human rights. This again supports the opinion of Zedner (2007b) and enables one to argue that through the conflict of human rights and counter-terrorism measures, the human rights standards expected under the criminal justice system has resulted in the development and introduction of a new counter-terrorism justice system. Within the creation of the counter-terrorism justice system the use of a pre-emptive and preventative approach has increased, lacking in the analysis of the risks results in over-broad pre-emptive and preventative measures being adopted.

PRE-EMPTION AND PREVENTION: THE KEY APPROACH TO COUNTER-TERRORISM POST-9/11

Police involvement throughout the process of investigating terror suspects and gathering intelligence and evidence had increased post-9/11 under the UK strategy (Deputy Assistant

²⁸ The 'former Labour UK government' was the Labour Party between 1997 and 2010, the 'former coalition UK government' is reference to the Coalition government made up of the Conservative Party and Liberal Democrats elected after the 2010 general election.

Commissioner Peter Clarke, 2007). This was considered important due to the perceived increased risk terrorism posed to public safety. It is suggested by Chaliand and Blin (2007) that the age of deterrence gave way to the age of pre-emption and as a consequence of 9/11 pre-emptive and preventative measures became intertwined as a basis for tackling terrorism (Chaliand and Blin, 2007: 417). Ericson and Haggerty (1997) and Walker (2004: 314) describe UK anti-terrorism policy as switching from reactive to proactive in policing and management of the risks posed. At The Colin Cramphorn Memorial Lecture (24th April 2007), the then Deputy Assistant Commissioner Peter Clarke²⁹ stated that the police have moved towards a 'Risk Management' model of counter-terrorism. Under this model the police are expected to intervene when the level of risk becomes undesirable, rather than intervening when evidence to support prosecution becomes available. This thesis will argue that early interventionist approach can prevent evidence and intelligence from being gathered to support subsequent prosecution and conviction, which is contradictory to the UK Strategy (2011). However, McCulloch and Pickering (2009: 629-30), support pre-emptive actions and accept that it such actions can take the form of coercive policing or state intervention despite no evidence or conviction existing. As this thesis will show, this lack of focus in providing the police a test to determine that a threat is imminent before enforcing emergency counter-terrorism powers, consequently undermines pre-emptive actions to prevent terrorism; done by restricting the available collection of intelligence and evidence to secure a conviction against a suspect.

Pre-emptive measures, which are also referred to as 'pre-crime',³⁰ are the processes used to forestall possible risks, and as a result over-shadow post-crime and use of the criminal justice system (Zedner, 2007a: 261-262). It is asserted by Amoore and de Goede (2008: 8) that 'pre-emption draws on but goes beyond the established language and techniques of risk', which, as explained by McCulloch and Pickering (2009: 629-30), focus on identifying future terrorists, by means of suspicion, rather than identifying the specific root causes of terrorism. This is arguably because effective profiling of terrorists has been found to be difficult, if not impossible. Hoffman (2006: 7), Harris (2002: 1) and Hayes (2005: 37) found there was no statistical evidential link between "psycho-sociological features, nationality or birthplace"³¹

²⁹ Peter Clarke, Deputy Assistant Commissioner 'Learning From Experience – Counter Terrorism in the UK since 9/11' The Colin Cramphorn Memorial Lecture (24th April 2007) <<http://www.gees.org/documentos/Document-02228.pdf>> accessed 29th August 2013.

³⁰ The term 'pre-crime' is taken from 1950s The Minority Report by Phillip K. Dick.

³¹ McCulloch and Pickering (fn 3) 635.

and the risk of terrorism. Likewise, Goldson (2006) found no positive links post-9/11 to identifying terrorists through racial, ethnic and religious profiling, although these factors continue to be used as proxies for risk calculation (Cole, 2006; Ansari, 2005; Hagopian, 2004; Harris, 2002). Zedner (2007a) identified a framework for the best means of characterising pre-emption as: "calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all of these, there is the pursuit of security".³² Pre-crime requires the accurate prediction of threat which is obtained through intelligence. The prevention of terrorism and pursuit of security has led to a 'growing and profitable field of 'crime science' that sees prediction and risk management as entirely feasible and objective' (Zedner, 2007a: 267-8; McCulloch and Pickering, 2009: 635).

Preventative measures, on the other hand, are accepted as being non-punitive, reducing the likelihood of the would-be or suspected terrorist committing acts of terror, or, as suggested by Sutton et al (2008), they 'address the broader context in which people commit crime through a range of social and environmental strategies'.³³ As asserted by McCulloch and Pickering (2009: 631), preventative measures are part of a framework that are less concerned with gathering evidence, prosecute, convict and punish terrorists, instead place greater emphasis on targeting and managing threats and risks through disruption, restriction and incapacitation; this will be shown to happen when discussing various counter-terrorism measure such as TPIMs/ETPIMs. On this basis preventative measures do not support the current UK Strategy 2011 to secure prosecution, conviction and punishment of terrorists. It is important to note that theorists of risk society believe control is ideological and will fall short of measuring reality (Aradau and van Munster, 2008; Amoore and de Goede, 2008: 23), this means that whilst counter-terrorism measures try to control terrorist suspects it will fail to achieve this as will be shown in Chapter Four when discussion Deportation with Assurances. Each of the counter-terrorism measures that this thesis will examine are, arguably, by their nature, both pre-emptive and preventative. They prevent or delay the criminal justice system from playing its role to punish and enable 'intervention at such an early stage in any engagement or

³² McCulloch and Pickering (fn 3) 631. Also see: Lucia Zedner 'Pre-Crime and Post-Criminology?' 2007a *Theoretical Criminology*, 11(2): 261-281, 626.

³³ McCulloch and Pickering (fn 3) 629.

potential engagement with terrorist-related activity or support...';³⁴ and therefore either deter any terrorist or manage the risk they are suspected of posing.

UK STRATEGY POST-9/11 AND FOLLOWING THE SECURITY REVIEW 2010

The former Labour UK government developed its counter-terrorism strategy in 2001 (ATCSA Part 4) and then more specifically in 2003, which was subsequently rebranded 'CONTEST' in 2009. This was later updated by the coalition UK government creating the current UK Strategy 2011 which was in line with the MacDonald Report (2011). The UK strategy became the driving force to provide the state and law enforcers with powers to prevent terrorism as part of a security response (Walker, 2010a: 4). As explained earlier, the counter-terrorism laws introduced followed on from the TA 2000; each of them, and including s44 of TA 2000, aided in establishing an era countering terrorism predominantly based on pre-emptive and preventative measures. Previous approaches, such as those used during the IRA struggles between the 1970s and 1990s, were more reactive instead of proactive. This change in approach was recognised and welcomed by the then Deputy Assistant Commissioner Peter Clarke because 'no longer can the police service feed off the crumbs falling from the end of the intelligence table'.³⁵ In other words, the role of the police is now proactive and supports the UK strategy to pre-empt and prevent terrorist attacks; the perception being, that otherwise if the police continued with a reactive approach they would be dealing with the aftermath of the attack and would be reliant on the Security Services to do their job.

During the Terrorism Review 2009,³⁶ Lord Carlile QC, the then role as Independent Review of Terrorism Legislation, believed that terrorist threats emanated from Islamist extremism. But the idea that terrorism in the modern era only stems from Islamist extremism is arguably unreasonable and may result in 'ethnically imbalanced' measures being taken which would arguably be risky for various reasons, including the creation of 'suspect communities' (Choudury and Fenwick 2010). Hazel Blears, the former Minister of State for Community Safety, Crime Reduction, Policing and Counter-Terrorism in the Home Office, submitted to

³⁴ Helen Fenwick and Gavin Phillipson 'UK Counter-terror law post 9/11: initial acceptance of extraordinary measures and the partial return to human rights norms', in 'Global Anti-Terrorism Law & Policy' (Second Ed.), Ramraj, V., Hor, M., Roach, K., & Williams, G. (Cambridge: Cambridge University Press 2012), 481-513, 481.

³⁵ Clarke (fn 29).

³⁶ Lord Carlile QC of Berriew 'Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006' 2009a (June) <<http://www.statewatch.org/news/2009/jun/uk-carlile-report-2008.pdf>> accessed 12th May 2012.

the Home Affairs Select Committee (2004-2005) in order to deal with terrorism, which most likely emanates from an extreme form of Islam 'some of our counter-terrorism powers will be disproportionately experienced by people in the Muslim community. That is the reality of the situation...' ³⁷ However, when there is no evidence that link race, ethnicity or religious beliefs to terrorism, as discussed earlier, this remark can only be based on terrorist stereotypes rather than evidence.

During the 2010 general election the Conservative Party promised to review the use of control orders whilst the Liberal Democrats claimed they would abolish them. The UK coalition government (henceforth 'the former coalition UK Government'), formed by both of these parties led with a Conservative Party majority, raised one question: what does the future hold for pre-emptive and preventative measures of countering terrorism? On the 18th and 19th October 2010 the UK government announced its National Security Strategy and Strategic Defence and Security Review, both entitled 'A Strong Britain in an Age of Uncertainty' (henceforth 'the Strategy Review 2010'). ³⁸ This provided details of how the Government believed it can counter-terrorism and the threat of it:

"[There is need] for a radical transformation in the way we think about national security and organise ourselves to protect it. We are entering an age of uncertainty. This Strategy is about gearing Britain up for this new age of uncertainty – weighing up the threats we face, and preparing to deal with them. But a strategy is of little value without the tools to implement it..." ³⁹

On the 6th January 2011 the then British Prime Minister, David Cameron MP, told the British media that "I think we need a system that keeps the country safe but that respects our freedoms..." ⁴⁰ Earlier in 2010 the then Home Secretary, Theresa May MP, appointed Lord MacDonald QC of River Glaven to review the UK counter-terrorism laws, which will be

³⁷ Home Affairs Select Committee 'Developments since 9/11' Sixth Report (2004-2005, 22nd March 2005), House of Commons, 167
<<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/165/16509.htm>> accessed 22nd January 2011.

³⁸ HM Government 'A Strong Britain in an Age of Uncertainty: The National Security Strategy', (Cm 7953, October 2010).

³⁹ Ibid 3.

⁴⁰ BBC News: Politics 'Control orders need replacing, David Cameron says' (5th January 2011a) <<http://www.bbc.co.uk/news/uk-politics-12120911>> accessed 6th January 2011.

considered and commented on throughout this thesis. Whilst the coalition UK Government continued to endorse the former Labour UK governments strategy of 'Pursue, Prevent, Protect and Prepare', greater emphasis had been placed on the preventative pillar of the UK strategy as supported by Baroness Neville-Jones, the then Minister of State for Security and Counter Terrorism (Home Office, 2011e). With two political parties formulating the coalition UK government, one party [Liberal Democrats] has advocated the abolition of control orders and the other [Conservative Party] wished to simply review them; how does the Government intend on strengthening preventative measures when the existing preventative regimes are not fully supported? Would the approach of preventing terrorism truly differ under the new strategy? The coalition UK government wanted to rebalance the measures to tackle terrorism to provide safety and security whilst respecting the rights valued by UK customs and principles; it will be argued throughout this thesis that attempts were made in light of the introduction of TPIMs and ETPIMs but more needs to be done.

Both the Strategy Review (2010) and the MacDonald Report (2011) provided recommendations to improve the intended operational aim of s44 stop and search, as well as general counter-terrorism police stop and search powers. S44 was a key preventive/information gathering counter-terrorist measure used in the UK pre-dating 9/11. As mentioned, the TA 2000 generally does not take a preventative approach, however s44 was believed to have played a key role in counter-terrorism: by maintaining a pre-emptive police presence it was believed that terrorists were unlikely to carry out acts of terrorism (Home Office, 2009-2010); and through preventative engagement by stopping, questioning and searching those who the police suspected posed a terrorist threat (Lord Carlile QC, 2009). Powers such as s44 were intended, so far as the Metropolitan Police were concerned, to create a hostile environment for terrorists to operate and therefore disrupt, deter and prevent terrorist-related activity.⁴¹

⁴¹ Metropolitan Police 'Section 44 Terrorism Act 2000 Standard Operating Procedures' (1st August 2007) <http://www.met.police.uk/foi/pdfs/policies/stop_and_search_s44_tact_2000_sop.pdf> accessed 18th March 2011.

SECTION 44 OF THE TERRORISM ACT 2000: A KEY ASPECT OF A PREVENTATIVE COUNTER-TERRORISM STRATEGY

As explained earlier, the Home Office (2009-2010) viewed s44 as an important part of the counter-terrorism strategy because of the hostile environment such powers would provide. *Prima facie* the government implemented s44 with the clear intention of ensuring the police could act when they suspected an individual of being involved in terrorist-related activity without the constraints of establishing reasonable cause, as per ordinary stop and search powers. These widened powers, as explained by Lord Lloyd of Berwick, were designed to facilitate the authorities in their duties of interception and thwarting terrorism (Walker, 2004: 168).⁴² Stop and search is ordinarily a primary tactic of policing, and during threats of terrorism can form part of 'high policing' strategies which are adopted by the police during covert surveillance, intelligence gathering and clandestine interference of terrorist plots (Weisburd et al, 2010: 726). High policing is significantly different from ordinary policing tactics due to the lack of transparency and accountability, and the carefree disrespect of human rights (Weisburd et al, 2010: 726; Bayley and Weisburd, 2009); risks which will be explored in greater detail in Chapter Two. One may well find that s44 provided police with the opportunity to abuse their position of authority; a concern raised by Lord Carlile QC the Independent Terrorism Review (2009). The relationship between the state or police and society or local communities can be delicate and often fragile (Deputy Assistant Commissioner Peter Clarke, 2007), therefore wide powers such as s44 risk causing further frictions, which will be considered in Chapter Two. During the ELSA seminar Lord Carlile QC stated 'I am offended by its use [s44]'⁴³ and it is a 'very major problem' in countering terrorism.⁴⁴

In what may be considered an attempt to further support the police and broaden their stop and search powers, the former Labour UK government enacted s58A amending the TA 2000 making it an offence to take pictures of police officers. The decision to do this was validated on the basis that 'there may be situations in which the taking of photographs may cause or

⁴² Clive Walker 'Terrorism and Criminal Justice: Past, Present and Future' (2004) Criminal Law Review (May), 311, 168 citing Lord Lloyd of Berwick, Inquiry into Legislation against Terrorism (Cm 3420, London, 1996), 10.14 and 10.21.

⁴³ Lord Carlile QC of Berriew (fn 8).

⁴⁴ Ibid.

lead to public order situations or raise security considerations'.⁴⁵ Whilst the anonymity of officers may be considered important to fulfil their duties, as some examples will show in Chapter Two, this police protection reduced the transparency and accountability of police when executing emergency powers and an increased opportunity to abuse and take advantage of those emergency powers under the TA 2000.

It was noted by Hasisi et al (2009) that police dedicate more time to improving their strategies and tactics of counter-terrorism, spending less time on problem solving and improving their relationship with the community. When stop and search under s44 was enforced by the police the process of gathering evidence and intelligence to support any possible criminal process began. With broad powers the police had wider discretion and able to interpret information given to them by suspects, which could have been used to either detain or release a suspect. Information gathered could also be used to support other measures including deportation, a control order or TPIM. As this thesis will argue, these measures were used as an alternative to divert suspects away from the criminal justice system.

During the Independent Terrorism Reviews by Lord Carlile the use of s44 was criticised, which David Anderson QC repeated⁴⁶ in his Independent Terrorism Review (2013), welcoming the repeal of s44.⁴⁷ Since its introduction s44 had caused considerable public outrage and protest, and with the support of Liberty it was challenged in the ECtHR in *Gillan and Quinton v United Kingdom*,⁴⁸ where it was ruled that s44 violated Article 8 ECHR. Although the decision of the ECtHR will be considered in greater detail in Chapter Two, the decision of the court subsequently led to the then Home Secretary, Theresa May MP, informing the House of Commons on the 8th July 2010:

"...This judgment found...section 44 of the Terrorism Act 2000 amount to the violation of the right to a private life. The Court found that the powers are drawn too broadly...It also found

⁴⁵ Fred Miranda 'Jail for photographing police?' British Journal of Photography (28th January 2009), 248 <<http://www.bjp-online.com/>> accessed 20th May 2012.

⁴⁶ In 2012 David Anderson QC was appointed as the Independent Reviewer of Terrorism Legislation, replacing Lord Carlile QC of Berriew.

⁴⁷ David Anderson QC 'The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (July 2013) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf> accessed 3rd September 2013.

⁴⁸ *Gillan and Quinton* (fn 15).

that the powers contain insufficient safeguards to protect civil liberties...I can therefore tell the House that I will not allow the continued use of section 44..."⁴⁹

In Chapter Two, when examining whether s44 did facilitate in the intelligence and evidence gathering processes to prosecute a terrorist suspect it will be compared to the phenomenon of control orders. It will become clear that they form a separate part of the UK's preventative strategy rather than a punitive one. Despite this they operate differently: s44 was applied to the wider public, whilst control orders were used against a small number of suspects; the s44 measure is an adaptation of pre-existing criminal justice system powers (eg s1 Police and Criminal Evidence (PACE) Act 1984), whilst control orders operated outside of and parallel to the criminal justice system; s44 was generic in its suspicion of suspects, whilst control orders was based on suspicion formulated by an intelligence-led process undertaken by the Security Services.

CONTROL ORDERS: A KEY ASPECT OF A PREVENTATIVE COUNTER-TERRORISM STRATEGY

During the IRA struggles the British government used powers of internment⁵⁰ as part of its approach to counter the terrorist threat presented by the IRA, a measure described as being similar to the control order regime (Patrick Mercer MP, House of Commons (Hansard), 2006-2007, 22nd February 2007). The use of internment as a measure to prevent terrorism was challenged in *Ireland v United Kingdom*⁵¹ and was held to be in breach of the ECHR. As a consequence of 9/11 it was perceived by the former Labour UK government that the TA 2000 would prove to be insufficient alone in its response to the terrorist threat; therefore the ATCSA 2001 was introduced, implementing the Part 4 measure as discussed earlier. The then Home Secretary, David Blunkett MP, said that the provisions under ATCSA 2001 would result in the 'strengthening [of] our democracy and reinforcing our values is as important as the passage of new laws...the legislative measures...outlined today will protect and enhance

⁴⁹ House of Commons 'Terrorism Act 2000' 2010-2011 (Hansard, 8th July 2010) 513(29): 540-549.

⁵⁰ Internment is best understood as an act of confinement and is generally described as imprisonment without trial. It was used as a strategy known as 'Operation Demetrius' by the British Government when attempting to tackle the terrorist threat posed by the IRA. Operation Demetrius was implemented on the 9th and 10th August 1971, during which time mass arrests and internment had taken place.

⁵¹ *Ireland v United Kingdom* (1978) 2 EHRR 25; 1978 Series A No 35.

our rights, not diminish them...'.⁵² It is noteworthy that as a result of this counter-terrorism legislative framework, if a British citizen were suspected of terrorism they would continue to receive the full panoply of protections under the ECHR, whilst the same could not be said for non-British citizens (Hoffman, 2004: 947).

The provisions under Part 4 were challenged in the House of Lords with a committee of nine Law Lords rather than five in the *Belmarsh* case. The court upheld the former Labour UK government's argument that there was a public emergency threatening the life of the nation, largely due to the court not being in a position to challenge this assertion. Although the House of Lords declared the provisions unlawful under s4 Human Rights Act (HRA) 1998, the only time they have declared the incompatibility of UK legislation enacted since the HRA 1998 in the terrorism context. Despite the ruling and there being no obligation under the declaration on the government to change the law, they did so. This was done in an attempt to realign these measures, or similar measures, with human rights, which would reduce potential challenges against such measures from being used, although when exploring the control order regime and Deportation with Assurances, in Chapters Three and Four respectively, it will be shown that this did not happen. It will be argued that in changing the law the government could also try and ensure the new measures would enable the UK to deal with terrorist suspects without fear of due process compliance or human rights protections, in the name of national security – demonstrating that human rights would become a victim of its own success. On the 26th January 2005 the Home Secretary stated a twin-track approach would be introduced: one to deport foreign nationals with assurances which became known as Deportation with Assurances; and the other to employ control orders which could be imposed upon national or foreign suspects. This led to the government withdrawing its derogation from Article 5 ECHR and enacting the PTA 2005 to support the latter twin-track approach.

The control order regime was applicable to both British and foreign suspects alike. Paralleling the previous scheme, it does not require proof of criminal activity and therefore operated outside the traditional operations of the criminal justice system. Control orders were described under s1(1) PTA 2005 as an order 'against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'. The concept of risk is spread across a wide spectrum from serious to insignificant,

⁵² House of Commons 'Anti-terrorism Measures Debate' 2001-2002b (Hansard, 15th October 2001) 372(30): 923-940, 925.

and risk is poorly defined here, although the notion that the risk is connected with terrorism may give the impression that the risk was serious. It becomes relevant when ensuring that the appropriate measures are imposed against a suspect to curtail their ‘terrorist activity’, although it must be remembered that without any conviction the terrorist activities were allegations for which the suspect is innocent until proven guilty (Article 6(2) ECHR).

As mentioned in the introduction, the PTA 2005 had ‘non-derogating’ and ‘derogating from Article 5 ECHR’ control orders, the latter never being. When non-derogating control orders were made against a suspect “obligations” would be placed against the controlee; intended to curtail the suspect’s terrorist activity. S1(4) PTA 2005 provided an illustrative list of such obligations, ranging from restrictions on possessing certain items, entering certain public areas, electronic tagging curfew and many other obligations. The use of certain obligations, namely prohibitions on association and curfews, became the subject of criticism and were identified for improvement through the replaced TPIMs and ETPIMs, which will be discussed in Chapter Five.

Due to the restriction on a suspect’s freedom caused by the imposed obligations, the Parliamentary Joint Committee on Human Rights described the control order regime as amounting to ‘virtual house arrest’ with the homes of suspects being used as ‘domestic prisons’.⁵³ There was concern that it could cause a ‘controlee’ to become segregated and isolated from the wider community, a risk identified by Lord Bingham in *Secretary of State for the Home Department v MB and AF*.⁵⁴ However, Lord Hoffman in *Secretary of State for the Home Department v JJ*⁵⁵ stated that suggestions [such as those by the Joint Committee], that a control order placed the controlee in prison would be ‘an extravagant metaphor’.⁵⁶ In their 2010 Report on the renewal of the PTA 2005, the Joint Committee on Human Rights argued that control orders had a much wider effect than the conditions placed upon the controlee. Their acknowledgment and similar recognition from the case of *CA v Secretary of State for the Home Department*⁵⁷ identified that the impact of such counter-terrorism measures indirectly impacted upon the family of the suspect:

⁵³ Fenwick and Phillipson (fn34) 481-513: 4.

⁵⁴ *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] 1 AC 499; [2007] 3 WLR 681, paragraph 8 Lord Bingham noted the applicant (AF) ‘was cut off from the outside world’.

⁵⁵ *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2007] 3 WLR 642.

⁵⁶ *SSHD v MB and AF* (fn 54) [45].

⁵⁷ *CA v Secretary of State for the Home Department* [2010] EWHC 2278 (QB).

'We heard with alarm about the 'growing use' of conditions in control orders which require the controlled person to move out of the community in which they live and stay away from it – 'a form of internal exile' as it was described. We learned that these 'relocation conditions' are being used to require British citizens who have grown up in a particular community to uproot themselves from that community and move to a new and unfamiliar location. The impact of such relocations on the controlled person's families was described as 'extraordinary'.⁵⁸

In their earlier report of 2005-2006b, the Joint Committee on Human Rights heard evidence that the controlees' children would live in trepidation and had witnessed their fathers' being arrested numerous times. This experience would leave the children 'severely traumatised'.⁵⁹ Within the neighbourhood, or community of the family, the view of the controlee living under strict conditions caused neighbours to alter their views of the family and the children to be stigmatised at school (Ewing and Tham, 2008). This means that control orders had a much wider effect and raised issues relating to human rights and consequential social risks, which this thesis will argue is a consequence of the counter-terrorism measures adopted by the UK. The allegation that an individual is suspected of being involved with terrorist-related activity is an allegation of the utmost gravity. The control order regime removed traditional rights guaranteed by the criminal justice system and, as will be established in this thesis, created divides and fostered animosity within society towards the UK.

Control orders were viewed by politicians as dangerous and draconian. Having described control orders as being similar to internment used during the IRA conflict, Patrick Mercer MP compared the two measures:

"I saw the effects of internment. I saw the effects of men and women who were released after months in detention without charge and the damaging influence that they had on the counter-terrorist campaign in Northern Ireland. One of my objections to control orders, among many

⁵⁸ Joint Committee on Human Rights 'Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010' 2009-2010a Ninth Report (26th February 2010), HC 395/HL 64: 41.

⁵⁹ Keith D. Ewing and Joo-Cheong Tham 'The Continuing Futility of the Human Rights Acts' 2008 Public Law (Winter), 668-963: 676. Also see: Joint Committee on Human Rights 'Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006' 2005-2006b Twelfth Report (14th February 2006), HC 915/HL 122.

others, is that they impose a sort of terrorist ASBO status on the individual. Those individuals cannot help but become iconic in the communities to which they return."⁶⁰

The experience of police interference and control orders were discussed by the Joint Committee on Human Rights (2005-2006b) and evidence was given by one witness, who stated:

"They [the controlees] live in total seclusion under very strict conditions. They exist with the certainty that they will eventually be arrested again and they suffer severe depression and post-traumatic stress disorders due to their previous harrowing experiences and arrests at dawn..."⁶¹

Although control orders will be discussed fully in Chapter Three, the dominant trends identified will feed directly into the discussion surrounding the newer TPIMs and ETPIMs in Chapter Five. It will be shown in Chapter Three that the control order regime served a preventative approach to countering terrorism. Whilst control orders were intended to prevent a suspect from participating in acts of terrorism, the effects were much wider and of a magnitude that would *prima facie* contradicted the UK Strategy 2011; in turn, this raises questions about the use of pre-emptive and preventative measures to counter-terrorism. Chapter Three will consider this issue in relation to the potential that techniques of risk assessment have to legitimise or de-legitimise the use of such measures.

CONTROL ORDERS BEING REPLACED BY TPIMS: A NEW PREVENTATIVE MEASURE?

The development of pre-emptive and preventative measures to counter-terrorism has significantly increased since 9/11. There is a degree of Parliamentary acceptance with the lack of use, if any, of the criminal justice system and due process. This may be because modern terrorists place themselves outside the sphere of rationality and deterrence (Fenwick, 2010: 154) and the sanctions of the criminal justice system therefore would not deal with the threat. Many of the measures introduced are reactive from a terrorist threat or court decision, and the introduction and enforcement of those measures by third parties, such as politicians

⁶⁰ House of Commons 'Prevention and Suppression of Terrorism: Annual Control Order Renewal Debate' 2006-2007 (Hansard, 22nd February 2007), 434-461: 440.

⁶¹ Ewing and Tham (fn 59) 676. Also see: Joint Committee on Human Rights (fn 59).

and the police respectively, play a quasi-judicial role (Walker, 2010a: 15). Whilst this is a matter to explore in further detail in Chapter Two or Three when addressing matters of Article 6 ECHR, it is important to note that this raises questions and fears that the rule of law may be undermined. Ewing and Tham (2008) believe there is a 'commitment to a weak conception of the rule of law...in the sense of (1) the approach to interpretation; (2) the acceptance of punishment or restraint without conviction; and (3) the tolerance forms of arbitrary conduct by state officials at various levels'.⁶²

Before the repeal and replacement of the control order regime, various independent reviews were undertaken, the MacDonald Report (2011) noted that the control order regime was obstructing prosecution (2011: 9). The recommendations under the report were intended to re-align this preventative measure with the criminal justice system and develop a regime that aided in the prosecution, conviction and punishment of terrorists. In Chapter Five it will be explained how measures of this nature do not achieve this aim; ultimately supporting Chapter Six in its findings that such measures fail to achieve government aims under the UK Strategy 2011. The MacDonald Report (2011) accepted that there may be circumstances, such as an imminent threat to national security posed by a suspect who could not be prosecuted, which would require the use of powers to restrict the terrorist suspect. Although the campaign group Liberty (2011) welcomed the recommendations under the review and the reforms, Human Rights Watch (2011) conversely argued that the recommendations in the MacDonald Report (2011) do not go far enough to protect human rights, an argument this thesis will consider and conclude upon in Chapter Six.

In relation to measures introduced which work outside of the criminal justice system one must examine the suspects' rights to due process under Article 6 ECHR. In doing this it can be determined whether safeguards implemented within those measures satisfy those rights, and if not why and extent to which this is the case. It is therefore vital to identify and understand the relationship between the ECHR and UK preventative counter-terrorism measures. The interaction between the ECHR and control orders is of significance in relation to the new TPIMs to understand possible issues and risks that may be replicated by the new scheme or reduced.

⁶² Ibid.

HUMAN RIGHTS: THE INTERACTION BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PREVENTATIVE MEASURES IN THE UK

During the 19th Sultan Azlan Shah Law Lecture, Cherie Booth QC stated that "it is all too easy for us to respond to terror in a way which undermines commitment to our most deeply held values and convictions, and which cheapens our right to call ourselves a civilized nation".⁶³ The Joint Committee on Human Rights believed that "the protection of human rights is a key principle underpinning all the Government's counter-terrorism work",⁶⁴ and in the International Commission of Jurists (2009) Report on 'Assessing Damage, Urging Action' the former Labour UK government was urged to 'ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work'.⁶⁵ Following the 7/7 London attacks the then British Prime Minister, Tony Blair MP, said 'let no-one be in any doubt, the rules of the game are changing'.⁶⁶ Gearty (2005a) states that the dangers facing UK democracy and belief in human rights are 'so evil',⁶⁷ that the UK is 'entitled, indeed morally obliged, to fight back'⁶⁸ and believes that in doing so the UK may have to commit evil acts which contradict our fundamental principles. However, one would question whether it would truly be worth sacrificing the human rights' principles that the UK holds dear, in the hope that by doing so acts of terrorism may be controlled and managed, if not prevented. Undermining the UK's commitment to human rights may be an aim of terrorists and therefore, one may argue, contradicting those fundamental principles through the introduction of risk-filled counter-terrorism measures may be considered a victory to terrorism. Some may support the remarks of Tony Blair MP and possibly those arguments raised by Gearty and describe them as 'dispositive of precautionary risk'; this is what Aradau and van Munster (2008) describe as a 'vision of a disastrous future about to unfold [which] produces the depoliticised imperative of present action'.⁶⁹ The notion that fear of future terrorist attacks can fuel the decision-making process of government and state officials (eg the police) to take

⁶³ Fenwick (fn 7) 1328 citing Cherie Booth QC (26th July 2005) at the 19th Sultan Azlan Shah Law Lecture.

⁶⁴ Joint Committee on Human Rights 'Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In' 2009-2010b Sixteenth Report (25th March 2010), HC 111/HL 86: 6.

⁶⁵ Ibid: 5. Also see: International Commission of Jurists 'Assessing Damage, Urging Action' 2009 Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights <<http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>> accessed 10th August 2011.

⁶⁶ British Prime Minister Tony Blair MP during Prime Ministers Press Conference (5th August 2005) <<http://webarchive.nationalarchives.gov.uk/+http://www.number10.gov.uk/Page8041>> accessed: 22nd February 2011.

⁶⁷ Conor Gearty 'Terrorism and Human Rights' 2005a European Human Rights Law Review, 1: 1–6.

⁶⁸ Ibid.

⁶⁹ Claudia Aradau and Rens van Munster 'Taming the future: The *dispositif* of risk in the war on terror' in Louise Amoore and Marke de Goede 'Risk and the War on Terror' (Routledge, 2008) 99.

drastic action may be viewed as a precautionary approach and importantly is the sort of behaviour the TA 2000 intended to curtail.

During the judgment of the *Belmarsh* case Lord Hoffman stated that:

'[This case] calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom'.⁷⁰

The House of Lords, when it was still in existence before the introduction of the UK Supreme Court, was self-described as guardians to the rule of law and as described by Lord Bingham as "specialists in the protection of liberty".⁷¹ As suggested by Ewing and Tham (2008) a weak rule of law has 'implications for the judicial protection of human rights...leading inexorably to low levels of protection of human rights'.⁷² It is suggested that preventative measures increase tension, for human rights this tension tends to be at its most severe (Fenwick, 2007; 2010). This may raise concerns and fears of a lack of Convention compliance which would have greater negative risks, as will be shown throughout this thesis.

Ewing and Tham (2008: 685) argued that the HRA 1998 in connection to counter-terrorism measures has a fruitless function; Kavanagh (2009) disagrees and believes that 'marginal gains are better than no gains...and some measure of rights protection is better than flagrant violation across the board'.⁷³ The assessment of human rights under the ECHR throughout this thesis can either support Kavanagh's assertion that gains are being made, or show that no gains are being made at all. This thesis is likely to show that by the nature of the counter-terrorism measures used by the UK any gains are best described as 'pseudo gains' rather than 'real gains'.

It will be argued that those measures taken by the UK government are a greater threat to human security than terrorist activities, corroding British values which terrorists target:

⁷⁰ A and Others v SSHD (fn 24) 86.

⁷¹ Ewing and Tham (fn 59) 690 and A and Others v SSHD (fn 24) 39.

⁷² Ewing and Tham (fn 59) 670.

⁷³ Aileen Kavanagh 'Judging the Judges under the Human Rights Act 1998: Deference, disillusionment and the "war on terror"' 2009 Public Law 287–304: 304.

human rights and the rule of law (Hoffman, 2004: 933; Landman, 2007-2008: 77). Hoffman (2004) suggests that historically when societies “trade” human rights for security, neither is obtained. Instead minorities and marginalised communities suffer human rights violations, consequently increasing the role of disconnected and disenfranchised individuals, becoming susceptible to recruitment by terrorists and terrorist organisations, as well as generating enmity between the state and the affected communities (Hoffman, 2004: 935-47); a risk that this thesis will consider.

Since the 2010 general election human rights have become an issue of debate when considering counter-terrorism. The Conservative Party pledged to introduce a British Bill of Rights ('BoR') as a replacement of the Human Rights Act. The detail of the BoR was being considered by the Commission on a Bill of Rights who reported their findings to the UK Government on the 18th December 2012 (see Commission on a Bill of Rights),⁷⁴ the outcome of this report and the government's response is still outstanding. This thesis will not be considering the Commission's report and its relationship with counter-terrorism measures.

In determining the effectiveness of counter-terrorism measures, this thesis will show that human rights involve legal discussion supported by evidence and case law; compared to risk assessment which involves a holistic discussion on the arguments for and against use of measures. Whilst it will be shown with examples of case law that human rights may not be breached in terms of the impact on a specific individual when subjected to a specific counter-terrorism measure, it is argued that the risk assessment will suggest differently. For example, control orders were developed so they were compliant with basic human rights by creating the two types of control orders as previously mentioned; however, in examining the wider effect of control orders on suspects, their families etc, it will be argued that they are excessive and do not achieve the aim of security.

RISK ASSESSMENT: ITS RELATIONSHIP WITH HUMAN RIGHTS AND UK PREVENTATIVE MEASURES

Pre-emptive action involves the identification and separation of the 'suspicious from the 'normal', the 'risky' from the 'at risk'⁷⁵ (Edkins and Pin-Fat, 2004), whilst pre-emptive

⁷⁴ To see details about the Commission and its Report on a Bill of Rights visit the website <<http://www.justice.gov.uk/about/cbr/>>

⁷⁵ Amoore and de Goede (fn 5) 14.

security is 'based on a precautionary logic that normalises suspicion'.⁷⁶ In other words, pre-emptive measures are similar to the issue of risks; they are used as 'automated means through which the 'suspect' is sorted from the 'legitimate', the 'abnormal' is separated from the 'normal''⁷⁷ (Amoore and de Goede, 2005; Coward, 2006). It was argued by Ericson (2007) that pre-emptive security measures require radical reconfiguration of the law by two methods. One method is known as 'law against laws'; this is when new laws are introduced which result in the erosion or elimination of traditional principles, standards and procedures; the other method is known as 'surveillant assemblages'. Here surveillance methods are introduced to detect terrorist activity consequently resulting in the erosion or elimination of human rights' traditions etc. It has been acknowledged that such consequences of counter-terrorism measures tend to fail to adhere to the ECHR and common law values (Fenwick, 2007) and thus supports the view of Ericson (2007). The former method is illustrated by the implementation of s44, control orders and other measures of counter-terrorism that will be considered; the latter method, to some degree, over-laps with the former and is also illustrated by the use of s44 and pre-trial detention, which can form part of the evidence and intelligence gathering operations to support subsequent actions (eg conviction, deportation etc).

The previous UK counter-terrorism scheme, as provided under the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996, illustrated a degree of acceptance of emergency measures at times of 'immediate and severe need';⁷⁸ which it will be argued the counter-terrorism measures post-9/11 have lacked and should be a built-in safeguard to reduce risks such as abuse of process. Post-9/11 language, such as 'war on terror', is used to address issues of counter-terrorism which asserted the 'existence of a state of exception';⁷⁹ therefore exceptional measures have become more justifiable, for example the courts taking a deferential approach to the use of some measures which will be discussed. The Joint Committee on Human Rights explained that this becomes an issue when the government suggests 'there is a public emergency threatening the life of the nation',⁸⁰ giving rise to the government's belief of justification for introducing the measures that will be examined in this thesis. However, the lack of evidence or information may raise concerns of trust and belief, which may then lead to the public questioning whether

⁷⁶ Ibid: 16.

⁷⁷ Ibid: 99.

⁷⁸ Fenwick (fn 7) 1331.

⁷⁹ Fenwick (fn 6) 16.

⁸⁰ Fenwick (fn 7) 1328 citing Cherie Booth QC (26 July 2005); 19th Sultan Azlan Shah Law Lecture.

there really is any threat (Coutin, 2008: 220). This risk may then result in public distrust in the courts if they behave deferentially towards government action rather than act independently, defending human rights.

There is little evidence that control orders were an effective form of counter-terrorism, as conceded by Lord Carlile in the Independent Terrorism Review 2009 and David Anderson QC when giving evidence to the Joint Committee on Human Rights (19th March 2013).⁸¹ Historically, when similar powers have been used during the First and Second World War the House of Lords concluded that security outweighed civil liberties. There is an argument that the courts show a reluctance or deference to conclude that any of Parliament's pre-emptive measures are a step too far. Whilst giving evidence to the Joint Committee on Human Rights, Baroness Hale admitted that it is for 'the judiciary [to] do whatever parliament [tells] them to do'⁸² and Parliament decides what it is the judiciary should do. This supports the argument that the judiciary are deferential towards government counter-terrorism measures, which this thesis will consider and argue as a serious risk. The deferential attitude by the courts may best be labelled as the 'state of exception' theory (Agamben, 2005: 2) and practice of *homo sacer*, which enables the state to place its importance above law and order when dealing with matters of security. For example, although the government's introduction and use of s44, control orders and deportation are argued as breaching human rights in some way, they have been deemed acceptable methods of countering terrorism. In the Court of Appeal in *Shafir ur Rehman*⁸³ it was accepted by the court that the government should determine whether a threat to national security exists, giving the government unfettered decision-making to determine whether a suspect poses a terrorist threat and is a danger to national security, assertions that would not be challenged by an independent court.

It is submitted that human rights and risk are intertwined and non-compliance of human rights will tend to result in the existence of greater risks. It was explained by Whitty (2010) that areas of public administration such as the criminal justice system 'have been heavily

⁸¹ Joint Committee on Human Rights 'Review of the Terrorism Prevention and Investigation Measures Regime' 2012-2013b (19th March 2013): Uncorrected Oral Evidence of David Anderson QC <http://www.parliament.uk/documents/joint-committees/human-rights/David_Anderson_transcript_190313.pdf> accessed 21st September 2013.

⁸² Joint Committee on Human Rights 'Counter-Terrorism Policy and Human Rights (Eight Report): Counter-Terrorism Bill' 2007-2008 Ninth Report (7th February 2007) HC 199/HL 50.

⁸³ Secretary of State for the Home Department v Rehman [2000] EWCA Civ 168.

influenced by concerns about risk⁸⁴ with awareness of human rights and legal obligations increasing (2010: 2). Whitty questioned what the relationship between risk and human rights is and what the significance is when living in a high terrorist threat era (2010: 2), however when taking his points into account coupled with the UK Strategy, further questions may be raised. If the current government intends on re-balancing national security with human rights, is the ineffectiveness of the measure inherent or is it caused by the enforcement of the measure? This is particularly important when considering the use of emergency police powers or executive orders such as control orders or TPIMs/ETPIMs. Also, what considerations or safeguards need to be made when formulating any strategy with the view to using pre-emptive and preventive measures to counter-terrorism?

Risk and the measurement of risk involve the identification of various issues, which this thesis defines as 'weighing-up' the positives and negatives of pre-emptive and preventative counter-terrorism measures used; this would include considering the balance between national security and human rights against public safety. The development and use of counter-terrorism measures, such as s44 and control orders, display a number of dominant risk trends and concerns of due process which are identifiable within the individual measures and collectively. An example of such risks and due process, as identified by McCulloch and Pickering (2009: 630), is the labelling of a person as a 'terrorist' which is in itself a pre-emptive decision without evidence; compare this to a person being labelled as a 'criminal' which is given following due process, consideration of guilt or innocence and evidence. However, in the new era of pre-emptive and preventative measures of terrorism, sanctions are not as equally ascribed to terrorists as they are to 'ordinary criminals', with serious sanctions being applied "in advance of or without charge or trial and can be imposed or continued despite a not-guilty verdict".⁸⁵ Rather than the courts playing an integral and independent role, the state decides who is guilty and how best to 'punish' them.

Whilst s44 and powers of stop and search provide police with the opportunity to disrupt terrorist activity, it is evident that such powers are more readily open to abuse. The Metropolitan Police accepted that there are risks to consider:

⁸⁴ Nick Whitty 'Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector' 2010 London School of Economics and Political Science (January), 2.

⁸⁵ McCulloch and Pickering (fn 3) 630.

'...improve the security of London and enhance community confidence by demonstrating a visible, responsive and proactive style of policing...to disrupt, deter and prevent terrorism and help create a hostile and uncertain environment for terrorists...'⁸⁶

The Metropolitan Police, Government and Lord Carlile QC accepted that there were some concerns in relation to stop and search powers. When dealing with individuals who present a religious or cultural sensitivity the Metropolitan Police suggested that the police 'need to balance the likelihood of discovering the article to potential harm you may cause to the person'.⁸⁷ This is clear acknowledgment that ethnic and cultural sensitivities may exist and the state or police need to keep this in mind whilst dealing with threats of terrorism. The awareness of such concerns is likely to be a reoccurring theme throughout the examination of risk in pre-emptive and preventative counter-terrorism measures. This issue most likely to occur when terrorists are stigmatised as being 'Islamist extremists',⁸⁸ raising further questions for consideration: What factors do the police use to identify the 'risky' from the 'at risk', or the 'normal' from the 'abnormal': by their look, demeanour and conduct? The problem faced by the government, as discussed by Hardin (2003) and Humboldt (1854), is setting the right balance to achieve security whilst simultaneously preventing itself from violating individual freedoms (Hardin, 2003: 77).

As explained in the introduction of this thesis, the UK faces a balance between national security and human rights. It will be argued that most preventative measures introduced post-9/11 have favoured one over the other – usually national security over human rights. Some academics consider that there are models which suggest an appropriate course of action or measure be taken. There are three main models of countering terrorism: a War Model, a Criminal Justice Model and a Human Rights-Based Approach, although Landman (2007-2008: 103) and Large (2005: 143) suggest there is a fourth, known as 'Causes of Terrorism Model'. It is argued by Walker (2006: 1145) and Allen (1996: 37-40) that since the Diplock Report in 1972, the UK has largely adopted the Criminal Justice Model and not the War Model (Walker, 2006: 1145; Landman, 2007-2008: 103). The Criminal Justice Model is viewed as the correct approach to take to sustain a long-term campaign as it is consistent with

⁸⁶ Metropolitan Police (fn 41) 7.

⁸⁷ Ibid: 11.

⁸⁸ Lord Carlile QC of Berriew 'Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006' 2009a (June) <<http://www.statewatch.org/news/2009/jun/uk-carlile-report-2008.pdf>> accessed 12th May 2012.

the rule of law and ensures an appropriate response. The War Model on the other hand, which is adopted by the US, results in a lack of accountability and is inappropriate to the aims pursued, ultimately threatening the rule of law in a civil society (Walker, 2006: 1145). Given the arguments and risk concerns discussed earlier in this chapter in relation to preventative measures such as s44 and control orders, it will be argued that the Criminal Justice Model was suspended post-9/11 and a War Model adopted in its place. There is concern that there are temptations for the government to supersede the Criminal Justice Model with a security model, which may even be regarded as a 'Counter Terrorism Model' (Gearty, 2006), which would be founded on fear and suspicion (Gearty, 2006: 137; Landman, 2007-2008: 103) and help in the development of a new counter-terrorism justice system. This model, it will be argued, would suit the UK Security Services and would be developed to empower the state to make decisions which are contrary to human rights and due process protections. Such a model would allow the government to make assertions that a threat to public life and safety exists requiring emergency powers so action may be taken, with the judiciary taking a deferential view; this model would be a further example of 'laws against laws' (Ericson, 2007) as discussed earlier in this chapter.⁸⁹

The Criminal Justice Model, as suggested by Chief Justice Beverly McLachlin in *Charaouis v Almeri*,⁹⁰ citing *New Brunswick v G*⁹¹ (both American cases), ensure that prior to the state's detention of individuals for considerable periods of time they will be provided with fair due process and judicial involvement, a view supported by Landman (2007-2008: 105). In comparison the Human Rights-Based Approach which Landman (2007-2008: 78) argues is not a 'soft option', adheres to the morals, principles and values which are cherished in democracies, strengthening the rule of law, but also controlling the unintended results of terrorist attacks. It is not a soft option because it protects those principles such as legality, proportionality, non-discrimination, due process and an individuals' right to seek asylum (Landman, 2007-2008: 105). Rather than abandon those principles to tackle terrorism, they should be maintained. An appropriate balance may be achieved by an amalgamation of two models; Michael German (a former undercover FBI agent) suggests that a balance between the Criminal Justice Model and Human Rights-Based Approach should be created because:

⁸⁹ See page 42.

⁹⁰ *Charaouis v Almeri* [2007] 276 D.L.R. (4th) 594.

⁹¹ *New Brunswick v G*. [1999] 3 S.C.R. 46.

'[B]y treating terrorists like criminals, we stigmatize them in their community, while simultaneously validating our own authority. Open and public trials allow the community to see the terrorist for the criminal he [or she] is, and successful prosecution give them faith the government is protecting them. Judicial review ensures that the methods used are in accordance with the law, and juries enforce community standards of fairness...Checks and balances on government power and public accountability promote efficiency by ensuring that only the guilty are punished'.⁹²

As explained by Fenwick (2010), the Joint Committee on Human Rights believed that in order to re-set the balance accordingly it was time to 'bridge the gap between the rhetoric and the reality in the field of counter-terrorism policy and human rights';⁹³ in other words the human rights of the individual, not just the safety of the nation, should be considered when enacting and enforcing counter-terrorism measures. The role of the courts is an important one with its power to maintain such a balance; however, Keir Starmer QC (the then Director of Public Prosecutions) believed that there was a differing view between the government and the courts, stating 'our judges are wrongly undermining the war on terror by deliberately misinterpreting the law'.⁹⁴ This raises uncertainty over which approach the government and the courts should each take. It is noteworthy that German (2005) moots the notion that a parallel model, or holistic approach, rather than necessarily a specific one and instead incorporating the better ideas of several models. It is submitted that such a model is unlikely to be practical as it could not be achieved or maintained with current preventative measures; although this may be attempted in light of the MacDonald Report (2011) and other subsequent reviews and reports, forming a Criminal Justice/Human Rights Approach Model that Landman (2007-2008) favours which this thesis would argue provides the needed balance of national security and human rights.

CONCLUSION

Undoubtedly the terrorist attacks of 9/11 and 7/7 have questioned and placed the UK's commitment to human rights under greater pressure due to the counter-terrorism measures

⁹² Michael German 'Squaring the Error' in 'Law vs. War: Competing Approaches to Fighting Terrorism' 2005 (11th July), 14 <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA436141&Location=U2&doc=GetTRDoc.pdf>> accessed 25th February 2011.

⁹³ Fenwick (fn 6) 159.

⁹⁴ Keir Starmer 'Setting the record straight: human rights in an era of international terrorism' 2007 European Human Rights Law Review 2: 123-132, 125.

introduced. Post-9/11 the former Labour UK government were able to assert that the courts supported the measures introduced (Fenwick, 2010: 167) despite some of the concerns raised by judges and successful challenges brought. There are suggestions by Landman (2007-2008: 84-85) that when introducing counter-terrorism laws and enforcement of them there needs to be consideration given to the 'intimate and fundamental relationship between the imminence of the terrorist threat and the proportionality of the response'.⁹⁵ This thesis will argue that when using controversial counter-terrorism measures a safeguard should be whether the threat posed is imminent; this will be discussed in greater detail in Chapter Two. Landman supports the Secretary-General of the United Nations belief that proportionality is one of the five criteria: "seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences".⁹⁶ This in itself raises the question of who is best placed to judge whether enforcement of counter-terrorism laws is appropriate: the executive or the judiciary?

As mentioned earlier, the 2010 general election saw control orders being debated and whether they should be reformed or replaced. Prior to the long awaited MacDonald Report (2011), the UK media speculated that the government intended on reforming the control order regime by replacing them with 'Surveillance Orders'.⁹⁷ The media initially reported that whilst control orders would be repealed, the main provisions and implications of them would remain, meaning control orders would live on in all but name. In January 2011 the then British Prime Minister, David Cameron MP, stated that "the control order system is imperfect. Everybody knows that...It hasn't been a success. We need a proper replacement...",⁹⁸ and following the MacDonald Report (2011) TPIMs were identified.

The key theme that emerges from this chapter is the use of risk assessment to determine effectiveness of counter-terrorism measures, which will be analysed in later chapters. This is likely to result in consideration of alternative measures, for example bail rather than control orders, or alternative safeguards for existing measures, such as increased accountability or independent judicial scrutiny. A further theme relates to the unintended risks created by the

⁹⁵ Todd Landman 'Imminence and Proportionality: The U.S. and U.K Responses to Global Terrorism' 2007-2008 California Western International Law Journal 38: 75-106, 84.

⁹⁶ Ibid. Also see: United Nations Secretary-General 'A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change' 2004 (2nd December) UN General Assembly, U.N. Doc A/59/565, 207.

⁹⁷ BBC News: Politics 'Control orders: BBC learns detail of replacement regime' 2011b (11th January) <<http://www.bbc.co.uk/news/uk-politics-12163629>> accessed 15th January 2011.

⁹⁸ BBC News: Politics (fn 40).

use of pre-emptive and preventive measures, these include negative perceptions of the police and government or alienation of communities. Importantly there remains the main question which this thesis seeks to prove: do the pre-emptive and preventative measures used achieve the current UK Strategy to counter-terrorism? If they do not, what safeguards can be implemented to reduce the risks, increase effectiveness and provide a balance between human rights and national security?

CHAPTER TWO

POLICE POWERS: STOP AND SEARCH UNDER SPECIAL COUNTER-TERRORISM POWERS; THE IMPORTANCE OF RISK ASSESSMENT

‘It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence.’

– Lord Bingham⁹⁹

INTRODUCTION

This chapter will consider the use of the pre-emptive crisis powers under s44 TA 2000, and the negative impact or risks that such crisis powers create. S44 itself was a counter-terrorism measure that enabled the police to stop and search anyone within a designated area without grounds for suspicion. Measures of this kind create a number of risks related to human rights, specifically the right to privacy and arguably the right to liberty. In addition there are sociological risks caused by such measures, including the creation of social boundaries resulting in cultural segregation and ‘suspect communities’ (Greer, 2010; Fenwick, 2010); poor relationships between citizens and the police; and a negative perception of the police.

When considering the impact that such a pre-emptive measure has, there will be discussion of the legal challenges against the use of s44. Following the case of *Gillan and Quinton v United Kingdom*¹⁰⁰ the MacDonald Report (2011) found that although stopping and searching suspects without reasonable suspicion is operationally acceptable in exceptional circumstances (2011: 4), it recommended the need to be committed to introduce safeguards to prevent the risk of misuse (2011: 15). In the Independent Terrorism Review (2006) Lord

⁹⁹ Lord Bingham House of Lords decision in *R (on the application of Gillan (FC) and another (FC)) v Commissioner of Police for the Metropolis* [2006] UKHL 12.

¹⁰⁰ *Gillan and Quinton* (fn 15).

Carlile QC accepted that there was "little or no evidence that the use of section 44 has the potential to prevent an act of terrorism as compared to other statutory powers of stop and search".¹⁰¹ There are scholars, like Walker (2008) that believe that since the inception of s44 there have been five patterns that have manifested:

1. A continual use and renewal of s44;
2. S44 has a low rate of arrests on grounds of terrorism;
3. Higher rate of non-terrorist arrests;
4. Ethnic minorities have been disproportionately impacted upon; and
5. There has been an imbalanced geographical enforcement of s44.

The MacDonald Report (2011) recommended that there was a need to change the test for authorising s44 from 'expedient' to 'necessary', which one might argue is similar to a test of immediacy of the threat. A test based on the immediacy of the threat would examine how real or necessary it is to act before the terrorist attack is realised; this would therefore be an intelligence based analysis of the believed threat. Whilst this may be viewed as an assessment of proportionality, it also enables the consideration of effectiveness. Under the report it was recommended that powers similar to s44 should only be authorised for a maximum of 14 days, rather than 28 days. This would help reduce the likelihood of a continuous rolling-programme of such crisis powers as seen post- 9/11 with s44.

The report supported the idea of increased accountability and transparency as safeguards within crisis powers like s44. This would be achieved through clear communication as to why such powers were authorised and restricting the use of those powers to a specific geographical areas, therefore preventing such powers from being applied to 'the whole of London' as was seen during the lifetime of s44. Furthermore on accountability, the report suggested the police should be given discretionary use of crisis powers but there needs to be robust statutory guidance on its use. Lord MacDonald believed that s44 needed to be repealed

¹⁰¹ Lord Carlile QC of Berriew 'Report on the Operation in 2006 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006' 2007b (June) 31: 114
<<http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/lord-carlile-report-07?view=Binary>> accessed 4th September 2013.

and replaced – a view shared by Lord Carlile QC,¹⁰² conceding that s44 had been proven to be an ineffective power to counter-terrorism commenting: '[He was] offended by its [s44] use' and that it was a 'very major problem', describing it as 'oppressive'. This met its demise when it was challenged at the ECtHR, where it was accepted to be 'coercive'.¹⁰³

The decision of the ECtHR in the *Gillan and Quinton* case led to a Parliamentary statement by the then Home Secretary (House of Commons, 2010-2011, 8th July 2010), as mentioned earlier the former coalition UK government sought to pass the Protection of Freedoms Bill ('PoFB') 2011 and receive its Royal Assent.¹⁰⁴ S59 PoFA 2012 repealed s44 TA 2000 and replaced it with s61 PoFA 2012.¹⁰⁵ The s61 provisions purports to tighten the use of crisis powers of stop and search, although this thesis will establish that whilst s61 is an improvement on s44, the provision retains the same risks relating to human rights and sociological impact which still fails to subsequently support the UK Strategy to counter-terrorism.

This chapter will focus on s44 underpinning as it does the extent to which s61 is an improvement to counter-terrorism and therefore remains a risk. It will be argued that crisis powers such as s44 that provide no or insufficient safeguards, such a lack of accountability, create such risks. It will be argued that the consequences of the risks created by such crisis powers support terrorist propaganda and restricts, if not prevents, the police from pre-empting and preventing terrorism. It will also support the conclusion in Chapter Six, that pre-emptive and preventative counter-terrorism measures are ineffective because they do not assist in the intelligence and evidence gathering process to secure prosecution. This chapter will argue that safeguards, such as accountability and a test of suspicion should be created in order to reduce risks and strengthen the effectiveness of such measures.

¹⁰² Lord Carlile QC of Berriew (fn 8).

¹⁰³ *Gillan and Quinton* (fn 15) [59].

¹⁰⁴ The Protection of Freedoms Bill (PoFB) 2011 received its Royal Assent on the 1st May 2012 and will be referred to the Protection of Freedoms Act (PoFA) 2012.

¹⁰⁵ Protection of Freedom Act 2012, Section 61: "(1) A senior police officer may give an authorisation under subsection (2) or (3) in relation to a specified area of place if the officer – (a) reasonably suspects that an act of terrorism will take place; and (b) considers that – (i) the authorisation is necessary to prevent such an act; (ii) the specified area or place is no greater than is necessary to prevent such an act; and (iii) the duration of the authorisation is no longer than is necessary to prevent such an act".

Determining whether s61 is an effective and necessary crisis power is important because it was one of the failings of s44 raised by the ECtHR in the *Gillan and Quinton* case. The test of 'expedient' (s44(3)) gave no requirement or consideration of a risk assessment (Middleton, 2011b: 244); the s44 crisis powers were "neither sufficiently circumscribed nor subject to adequate safeguards against abuse...[and therefore, not] in accordance with the law".¹⁰⁶

Proportionality could assist in the assessment of effectiveness, this was best described by Rodin (2004) as a 'quasi-consequentialist' principle that deems there is a moral limit of the *prima facie* justified actions (i.e. stop and search under s44) and is triggered when actions do more harm than good. Crisis counter-terrorism measures like s44 and s61, are exhibited when a person's human rights are being harmed, or exposed to further risks of harm, without there being justification (Rodin, 2003: 768). For example, detaining a person or many people without reasonable belief that they are a terrorist or involved in terrorist activity, which may be based on an incorrect assertion may be viewed as unreasonable and therefore disproportionate; as such it is important that the potential terrorist threat is assessed.

Safeguards determining the immediacy of the threat can inform the decision-maker whether it is necessary to act, this would assist in determining whether enforcement of a crisis power was proportionate and effective. Whilst one may view s44 and s61 as a way of deterring terrorist activity, if the measure restricts the opportunities to collect intelligence and evidence to secure subsequent control, management or prosecution of terrorists then the measure, it will be argued, is ineffective and contradicts the UK Strategy 2011.

As part of the assessment of considering proportionality and effectiveness, the timing of any response needs to be considered. Under s44 the power could be used when it was 'expedient to do so' or when it was understood to be advantageous, as described in the *Gillan and Quinton* case, without defining when this should be. The progression of the *Gillan and Quinton* case to the ECtHR¹⁰⁷ will be discussed to support this thesis argument that pre-emptive crisis powers, like s44, should only be enforced when a terrorist threat will be realised or imminent. This will enable the identification of risks and issues pertaining to human rights. It will be argued that human rights, specifically ones right to privacy, are being

¹⁰⁶ Gillan and Quinton (fn 15) [87].

¹⁰⁷ Gillan and Quinton (fn 15).

negatively impacted upon either because of the courts deferential attitude towards the governments approach or they are gripped by the fear of ‘what if...?’. This becomes evidence to support the doctrine of ‘state of exception’ (Agamben, 2005) as mentioned in the Introduction of this thesis. Ultimately, the questions that need to be answered are: Do the pre-emptive measures support the UK Strategy to counter-terrorism? Are they an effective way of countering terrorism? In light of the risks identified, do the police have a role in countering terrorism?

THE ROLE OF THE POLICE

The British Police are considered to be ‘the most visible of all criminal justice institutions’¹⁰⁸ in the UK, providing a strong link between the police and citizens which is created by the style and tactics adopted by the police (Messenger, 2008: 4). This link is created by the notion that citizens work as police, arguably strengthened by the Police Reform Act (RFA) 2002 which enables members of the public to be trained as Police Community Support Officers (PCSO’s)¹⁰⁹ to work alongside ordinary police officers.

The Police Foundation and Policy Studies Institute in 1996 defined the role of the police as being responsible for fairly and firmly upholding the law and bring offenders to justice; preventing crime; protecting and reassuring the community; and to be seen executing their duties with ‘integrity, common sense and sound judgment’.¹¹⁰ The police are considered to be responsible for upholding the law and meeting public expectations (Goldsmith, 2010: 916). It is acknowledged by some that the police are ‘primarily concerned with preventing and detecting crime’ (Reiner, 2000: 170), although there is recognition of historical and sociological evidence which shows that ‘crime-fighting has never been, is not, and cannot be the prime activity of the police’, although this would be a popular perception by the media, public and is reflected in government policy (Reiner, 2000: 170).

¹⁰⁸ S Chermak and A Weiss ‘Maintaining Legitimacy Using External Communication Strategies: An Analysis of Police-Media Relations’ 2005 *Journal of Criminal Justice* 33: 501-512, 502.

¹⁰⁹ This thesis does not cover the powers of Police Community Support Officers and their powers, however it is important to note that PCSO’s are entitled to stop and search a person under the Terrorism Act 2000.

¹¹⁰ Policy Studies Institute ‘The Role and Responsibilities of the Police: The report of an independent inquiry established by the Police Foundation and the Policy Studies Institute’ 1996 11:1.4
<<http://www.psi.org.uk/publications/archivepdfs/Role%20pol/INDPOL-0.P.pdf>> accessed 4th September 2013.

The police have faced profound changes in law, transforming their powers and accountability as well as covert changes in policy and practice (Reiner, 2000: 167). Some scholars have remarked that policing has become a 'social good' and is an important component between the state and its interaction with the agents (eg the police) in their execution of justice (Loader and Walker, 2001). Reiner (2000) suggests that the police and chief constables have become less accountable at local level over the years, whilst accountability to government has increased (2000:167) and yet despite this view, UK policing is considered "public policing". This change in accountability may be considered defining characteristic of state power and control (Zedner, 2006a: 78; Messenger, 2008: 3) and a risk to the concept of public policing if accountability to the public were reduced. It will be argued that when enforcing counter-terrorism measures public support and perception is important, meaning there should be clear accountability when a measure is enforced by police.

The enactment of PACE 1984 was a landmark codification of police powers including stop and search, arrest and detention of suspects, by providing safeguards when those powers are executed (Reiner, 2000: 167). This development fundamentally transformed the 'doctrine of constabulary independence' (Reiner (2000:167) which supported the constables independent behaviour of having an unprompted sniff, instead PACE created a system of balance and checks which resisted arbitrary decisions. Reiner (2000) suggests that developments and changes in police identity and regulation were exposed to theories of a 'rational deterrent model' to policing crime, which consisted of:

$$\text{More police power} + \text{Greater deterrence} = \text{Less crime}$$

Although this formula was intended to apply to ordinary police powers, it will be argued that the wider police powers intended on tackling terrorism, such as s44, did not necessarily result in a reduction of terrorist-related activity. On the contrary such powers have a coercive impact, causing greater harm to public perception of the police and do not tackle terrorism effectively. If the role the police are expected to play in the fight against terrorism is criticised or questioned, then they will face greater difficulties in maintaining positive public perception which may have a consequential negative impact on how the police are viewed. For example, if the police are seen to exploit the use of crisis powers without safeguards

providing accountability or remedy when an abuse of process occurs, the wider public may perceive the police as not meeting the core duties as set out by the Police Foundation and Policy Studies Institute in 1996 (see page 51 of thesis).

Differences between ordinary policing & counter-terrorism policing.

There has been debate to the effect that since the 1980s policing has moved from a 'consensus' style of policing towards a more militaristic and coercive approach, which can be seen in powers linked to targeted surveillance and pre-emptive intelligence-gathering (Hall et al, 1978; Maguire, 2000; Sheptycki, 2000; Reiner, 2000:174). The traditional style of policing was considered to be reactive and incident-driven, focusing on response rates to incidents and retrospective investigation (Peak, Bradshaw and Glensor, 1992: 26). It is noteworthy that 'consensual policing' occurs when the police and citizens clash and can be contrasted with the 'law enforcement' style of policing commonly seen in the United States (Messenger, 2008: 4). The latter creates a divergence between citizens and the police, or state; however, the former is believed to reconcile these concepts by presenting the police as "citizens in uniform" (Loader, 1997: 5; Messenger, 2008: 4), which one would argue is a positive form of policing and in line with traditional British policing as already discussed.

A positive relationship or perception between the police and citizen can support the police in their duties to detect and investigate criminal behaviour; it can further support them in pre-empting and preventing terrorism by working with communities and the general public. The public's role in supporting the police in gathering information about terrorist suspects can be seen from a number of UK anti-terrorism campaigns (eg Metropolitan Police 'Counter Terrorism Campaign, 2012).¹¹¹ Some counter-terrorism experts have expressed the importance of reducing or minimising the number of campaigns raising public awareness of terrorism due to the suspicion and fear such campaigns can instil without there being a need to do so (Benoît Gomis, 2013a). Later in this chapter it will be discussed in greater detail that a negative perception of the police, or negative relationship between them and the public, does not assist them in their duties to protect the public or tackle terrorism.

¹¹¹ Metropolitan Police 'Counter Terror Campaign' 2012 (February)
<<http://content.met.police.uk/Campaign/counterterrorismfeb2012>> accessed 11th March 2012.

As mentioned in Chapter One, the TA 2000 was enacted pre-9/11 at a time when the UK government and Parliament had hoped such powers would not be needed and amalgamated previous counter-terrorism legislation; the intention to stop a cycle of introducing emergency powers (Walker, 2006: 1142). When s44 was presented to Parliament it was believed it did not fall foul of Article 8(1) ECHR, and if it did, it would meet one of the exceptions under Article 8(2).¹¹² Following 9/11 the police developed a greater risk management approach which supported their proactive style of policing to counter-terrorism, as confirmed by Deputy Assistant Commissioner Peter Clarke (pages 14 and 15 of this thesis). At the Counter- Terror Expo 2011 John Yates, the then Metropolitan Police Service Assistant Commissioner Specialist Operations, stated that the terrorist threat is even more severe than it has ever been, evolving “in a way that few could have predicted”,¹¹³ requiring an equally agile response.¹¹⁴ As policing terrorism became preventative, it meant there had to be a difference between preventing terrorism and investigating terrorism. Although preventative policing is the focus of this chapter, investigative policing and negative impact of counter-terrorism measures will be considered in more depth in Chapter Five. The ‘National Counter Terrorist Policing Network’, as described by John Yates, was therefore ‘interwoven’ into the mainframe of UK policing. The network itself consists of the Metropolitan Police’s Counter Terrorism Command (henceforth ‘CTC’) which is seen as the ‘operational nucleus’; then regional structures; and frontline police. The frontline police officer that provides support at a local and regional level is considered an integral part of counter-terrorism policing. This level of counter-terrorism policing may *prime facie* give the impression that police are still citizens in uniform, similar to ordinary policing as previously discussed in this chapter. This ‘pyramidal model of command’ under the CTC can support in the detection and management

¹¹² European Convention on Human Rights, Article 8: '(1) Everyone has the right for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

¹¹³ John Yates Metropolitan Police Service Assistant Commissioner Specialist Operations 'Tackling Terrorism – Achieving National Security Policing the Terrorist Threat' Counter Terror Expo Conference (19th April 2011) <<http://www.acpo.police.uk/ContentPages/Speeches/JohnYatesTacklingTerrorism.aspx>> accessed 15th August 2011.

¹¹⁴ Ibid.

of the terrorist threats across the UK, a model described by John Yates as 'the envy of our international partners'.¹¹⁵

It is argued however, that John Yates fails to understand that traditional policing is supported by the consensus or co-operation of the citizen, rather than a public perception that the police are citizens in uniform. Whilst non-compliance with ordinary stop and search powers (eg s1 PACE) can create an offence, counter-terrorism policing has taken on a form that amounts to 'proactive coercion', as will be shown by s44. Non-compliance under ordinary stop and search powers would not create an inference of guilt or suspected criminal activity, whereas non-compliance with a s44 stop and search command would have entitled the officer to draw inferences, supporting suspicion and arrest of the suspect for non-compliance under s47 TA 2000. The pyramidal model of command provides a useful insight into the policing command structure and therefore the ladder of accountability. When examining the structure in greater detail and understanding the requirements laid out under the TA 2000, for example obtaining the Secretary of State's confirmation to grant use of s44 power, one can see a wider picture of structural authority forming, as shown in Diagram 2 (below):

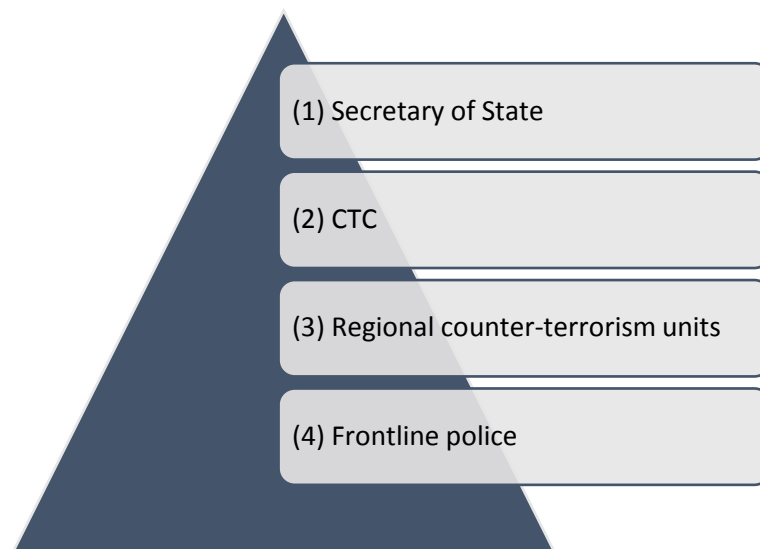


Diagram 2: Authority structure under section 44 Terrorism Act 2000.

¹¹⁵ Ibid.

It is understood that s44, and now s61, are adaptations of the criminal justice norms with minor adjustments. The police at all times remain players of the criminal justice system and specialist police are undistinguishable from counter-terrorism police when using such legislative powers. By doing this, the government has created a sense of normalization of a security measure or extraordinary power. The risk of normalizing counter-terrorism measures may result in the desired effect of the measure from being lost; this particular risk will be discussed throughout this thesis and considered in greater detail in Chapter Six.

In this chapter it will be shown that counter-terrorism policing, specifically s44 stop and search, was over broad, enforced in a broad fashion and breached Article 8 rights. The *Gillan and Quinton* case will show that other rights, including those under Article 5, had been considered by the court as potential breaches. To support this argument reference will be made to the more recent case of *Austin v United Kingdom*,¹¹⁶ which is not a counter-terrorism matter but considers Article 5 ECHR. In the *Austin* case those within a cordoned area, intended to isolate and contain a large crowd of people in dangerous and volatile conditions, had not been deprived of their liberty within the meaning of the Convention. The application was in relation to the specific tactic used by the police to disperse or control crowds of people known as ‘kettling’, which was done on grounds of public order. Not only will this be discussed below, it will be argued that s61 also would result in a breach of Articles 5 and 8 ECHR.

As mentioned earlier in this chapter, accountability is an important safeguard to regulate police conduct in ordinary policing (see s1 PACE). Accountability reduces the possibility of an abuse of process occurring and is underpinned by the prerequisite of ‘reasonable suspicion’. S44 however did not provide this safeguard and that lack of accountability allowed the police to take action which may be considered an abuse or disproportionate when enforcing the s44 powers. A lack of accountability could be seen at each level of the authority structure under s44 as shown in diagram 2 above, although this may extend to the judiciary who fail to regulate the actions and conduct of those implementing and enforcing counter-terrorism powers. Although other chapters of this thesis, like Chapter Three and Five, will

¹¹⁶ *Austin v United Kingdom* (2012) 55 EHRR 14; 55 EHRR 14; [2012] ECHR 459; [2012] Crim LR 544; 32 BHRC 618 (Application Numbers 39692/09, 40713/09, 40713/09 and 41008/09).

show labelling or stigmatising of ‘suspect terrorists’ happening by the government (eg Secretary of State), s44 would enable the police to do the same. This allowed the police to act in a quasi-judicial manner and create ‘suspect communities’ (Fenwick, 2010; Choudhury and Fenwick, 2011)¹¹⁷ through such labelling, yet were not accountable for the decisions-made or grounds to stop and search an individual under s44.

The importance of accountability as a safeguard in counter-terrorism policing.

It may be argued that accountability does not lie with any particular individual but with every key player from the Secretary of State, to the authorising officer of s44 power and the frontline police officer that enforces s44. Based on this chapter’s intended discussion of the mentioned negative consequences and risks of s44, it will conclude that the repeal of s44 was an appropriate course of action by the UK government. S44, and similar crisis powers, should only be enforceable at times when there is a genuine belief that there is an imminent threat of a terrorist attack, making the enforcement of those powers a necessity and an inherent safeguard to reduce any risk of abuse of process. Under the Impact Assessment of s44¹¹⁸ completed by the Home Office (2011c) s61 was intended to achieve this inherent safeguard, although it will be argued that it does not far enough. However, it is important to note that following the *Gillan and Quinton* case and the MacDonald Report (2011), s44 was repealed and instead counter-terrorism stop and search powers were implemented under s43 of TA 2000 which requires reasonable suspicion, similar to ordinary stop and search powers.

If any similar powers to s44 were introduced consideration should be given to ways of preventing or reducing the negative risks created, which Ashworth (2006) believed could be done by the ensuring the rule-of-law values are safeguarded (2006: 76). Under s44 there was a focus on the management of risk posed by terrorism by implementing a precautionary approach. This precautionary approach is a typical feature of pre-emptive feature as mentioned in Chapter One and fails to appreciate the importance placed upon human rights. It

¹¹⁷ Tufyal Choudhury and Helen Fenwick 'The impact of Counter-terrorism measures on Muslim communities' 2011 International Review of Law, Computers & Technology, 25(3): 151-181.

¹¹⁸ Home Office 'Terrorism Stop and Search Powers (Section 44 of the Terrorism Act 2000) Impact Assessment' 2011c (18th January) HO0033 <<http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/ia-terrorism-stop-search?view=Binary>> accessed 15th April 2012.

is therefore important that as the replacement of s44, s61 supports human rights and reduced the risks s44 created. By doing so, s61 will support the ‘Criminal Justice and Human Rights Approach Model’ rather than adopt a wholly new system as demonstrated by the ‘Counter-Terrorism Model’ (see Chapter One).

It is considered that the emotional attachment of fear experienced by the public and police and the perceived terrorist threat, enables the government to promote the counter-terrorism model (Edkins, 2007; Donoghue, 2010), this supports the state of emergency doctrine with various conflicts and risks. This chapter will argue that the courts should hold the government to account in its belief that such powers are necessary by establishing on what grounds they believe a terrorist threat exists and the immanency of that threat. This, it will be argued, would ensure that the enforcement of the crisis powers are proportionate to the threat and ensures accountability for the decision to enforce such powers.

‘CRISIS’ STOP AND SEARCH POWERS COMPARED WITH TRADITIONAL STOP AND SEARCH POWERS

The criminal justice and human rights approach model is considered a model of ‘operational accountability’ (Police Foundation and Policy Studies Institute, 1996: 11) and is manifest in the ordinary police powers of stop and search. Under s1 PACE and other ordinary police powers which are supported by statute, give regulation to police conduct and accountability therein. Powers providing regulation and protection to the police and public ensure the police can do their job without fear of legal action if adhered to; they maintain or build a positive perception of the police; and provide a remedy to those that are unfairly treated by those who act unfairly. As briefly mentioned earlier, s44 does not provide such stringent safeguards and allows uniformed police to stop and search vehicles or people within a designated area or place (s44(1)) without reasonable suspicion if this is authorised by a senior police officer and confirmed by the Secretary of State. In the *Gillan and Quinton* case the House of Lords found safeguards to exist within the TA 2000, which they believed provided protection to the public when traditional stop and search powers and ordinary guarantees are no longer applicable. They identified the safeguards as:

- (1) Authorisation is only to be given if the authorising person reasonably considers it expedient to do so in 'the prevention of acts of terrorism' (s44(1) and (2));
- (2) Authorisation should be directed to the overriding objective. Whilst this is not stated within the TA 2000 this point raised by Lord Bingham indirectly identifies a proportionality test for authorising the risk of terrorist attacks, however the Court of Appeal understood that given the modern world the UK is under constant risk of terrorism;
- (3) Authorisation cannot extend beyond a police area. However, it was acceptable to authorise the use of s44 to a broad area such as 'London' rather than specific borough's or districts of London;
- (4) Authorisation is limited to 28 days, although it may be continually renewed thereafter;
- (5) Authorisation may be provided only by a senior police officer and must be reported to the Secretary of State immediately whom must confirm the authorisation within 48 hours or it lapses;
- (6) The Secretary of State may alter the term in which s44 is authorised for or indeed cancel it;
- (7) S44 may only be authorised and exercised to search for articles which may be used in connection to terrorist-related activity;
- (8) In line with s126, the authorisation and use of s44 had to be reported to the Independent Reviewer of Counter-Terrorism; and
- (9) Any misuse of s44 may expose the authorising senior officer, police officers and the police force, and Secretary of State to legal challenges.

The TA 2000 has been broadly condemned as "immensely broad and imprecise" (Fenwick, 2002: 734; Zedner, 2009:130), and these identified safeguards would support this criticism. Unlike s1 PACE, s44 does not require the police to have reasonable suspicion that a person or group of people might be about to commit or have committed an act related to terrorism. The broad nature of s44 and its discretionary enforcement is such that some consider that the police should use their "copper's nose" (Lord Carlile QC, 2007b; Walker, 2008: 278), basing their actions and decision-making on intuition instead of using rational indicators. It is argued that this is wrongly condoned by Lord Carlile QC (2007b) and Walker (2008), as allowing the police the occasional unprompted 'sniff' (2008: 278) further empowers the police and state to become more intrusive. It would also be incorrect to allow police an unprompted sniff

because it would be a return to the ‘doctrine of constabulary independence’, which would be a return to policing pre-PACE and would be an erosion of high standards of policing. Despite this, under s45(1)(b) and s44 enforcement was given "whether or not the constable has grounds"¹¹⁹ and gives the police the unprompted sniff.

S44 was undoubtedly a pre-emptive measure adopted by the UK to counter terrorism as its focus is on identifying future terrorists (McCulloch and Pickering, 2009: 629-630); this can only be achieved by means of suspicion which is one of the natural characteristics of pre-emption as discussed in Chapter One. Whilst improved legislation could have provided an applicable test which police could have used to establish grounds of suspicion; an alternative way would have been for senior member of the authority structure, such as the Home Secretary providing circulars, explaining what factors police should be vigilant for when establishing grounds for suspicion. Clarity of this kind would have enabled the courts to hold those within the authority structure accountable for the decisions to authorise, confirm and enforce measures such as s44.

S44 enabled the police and the courts to support and facilitate the government’s view that the threat of terrorism is constant and required continued vigilance, otherwise failure to act could result in serious attacks. This has similarities to the powers introduced in the United States after 9/11 under the Patriots Act and in Germany when the Reichstag Fire Decree was signed into law in 1933. Whilst the UK has not resorted to such extremes per se, the argument by the UK government is the same in that; similar to these examples, the feared risks posed by terrorism requires ‘emergency powers’ to tackle the threat, resulting in a state of exception as previously discussed. So far from discussions within this chapter, the way in which the state of exception is being formulated and used by the state, is best illustrated in a simple equation:

$$\text{Fear} + \text{Extreme Powers} = \text{State of Exception}$$

Without the safeguards of ‘reasonable suspicion’, or similar, as required under ss42 and 43 TA 2000 or in ordinary policing, crisis powers such as s44 increasingly step away from the

¹¹⁹ Terrorism Act 2000, Section 44.

traditions of the criminal justice system. It also creates a further risk of enabling arbitrary decision-making to take place by those within the authority structure. S44 is an 'all-risks policing measure', treating anyone and everyone as a risk and potential threat (Walker, 2008: 276). Whilst intelligence may lead or result in certain suspects being stopped and searched, the lack of transparency and accountability of decision makers, particularly in circumstances when there is a lack of intelligence, raises questions about decisions made and the intrusive measures enforced such as s44 (Walker, 2008: 276).

When utilising s44 the police would treat the surroundings of the designated area and everyone therein as a risk without an assessment of the risk, this would support the CTC's new risk management attitude. Broad discretion over a wide designated area could become unmanageable and result in inconsistency in the enforcement s44 as it will be shown later in this chapter. This would mean strong intelligence would be needed to ensure s44 is enforced effectively and directly tackles the threat. Walker (2008) suggests that in circumstances when there is a lack of intelligence the police will focus their attention or suspicion, not on a particular individual, but rather the vulnerability or importance of specific targets which form the basis of their focus (eg Houses of Parliament, Buckingham Palace and Canary Wharf etc); these are also known as 'Critical National Infrastructure'.¹²⁰ In these circumstances the calculation of risk transfer from people to actions and objects (Walker, 2008); therefore is it appropriate to shift the identification of risk or suspicion from individuals to property or conduct, particularly when s44 is a coercive measure? The end result is that with insufficient information or intelligence, terrorism is tackled by treating everyone as a suspect for such innocuous activity as standing outside a government building or tourist monument; although this is the characteristics of pre-emption as discussed in Chapter One. It should not be acceptable to formulate suspicion on grounds that are not based on accurate intelligence or evidence, members of the public should be entitled to ask why they are being stopped and not face detention or prosecution for non-compliance as they could have been under s44 and may cause a person to suffer from embarrassment.¹²¹ Ordinary policing empowers the public to

¹²⁰ Critical National Infrastructure, also known as 'CNI', was referred to by Lord Carlile QC of Berriew, interview on Youtube <http://www.youtube.com/watch?v=M299YduyXZI&feature=player_embedded> accessed 29th April 2012.

¹²¹ The problem with s44 is not necessarily that coercion is used, rather the problem relates to the very broad discretion such powers are given to the police. Under s44 the police have no regulation or test to control on what grounds or basis they can enforce s44, therefore they can stop and search a person on a whim.

ask why they are being stopped and is good practice of accountability. For these reasons crisis powers such as s44 is coercive policing, and have retreated from community policing.

As explained earlier, these issues help demonstrate that in comparison to ordinary stop and search powers, s44 is exceptionally wide. As mentioned, this itself creates issues relating to a lack of transparency and accountability in the system, creating further risks and concerns of arbitrary decision- making and a negative impact upon a person's right to privacy (Bayley and Weisburd, 2009; Weisburd et al, 2010: 726). Whilst the TA 2000 provided the police with wide discretionary powers to stop and search individuals, the Independent Police Complaints Commission (henceforth 'IPCC') described how police should not exercise their powers of stop and search to 'simply be within the law',¹²² instead the powers should be used in a way that demonstrably meets the objectives of the police:

- (i) Fairness – the police should consider and be able to answer the question “why did you stop me?”;
- (ii) Effectiveness – achieved by regular monitoring; and
- (iii) Public confidence.

These objectives set out clear criteria that should be achieved to ensure stop and search is proportionate in day-to-day operations of ordinary stop and search powers, they could have been used by police to guide them in their use of s44. When considering whether s44 or the enforcement of s44 is proportionate, consideration should be given to Article 15 ECHR which allows derogation from the Convention rights so long as the "measures [go] no further than required by the exigencies of the situation".¹²³ In order to determine whether the use of s44 is proportionate in this context is best balanced by the immediacy of a terrorist threat (Sofaer, 2003: 209) and therefore making it necessary to enforce s44. Sofaer (2003) suggested there are arguments that pre-emptive action 'must be limited to actions in response

¹²² Independent Police Complaints Commission 'IPCC position regarding police powers to stop and search' 2009 (June)
<http://www.ipcc.gov.uk/sites/default/files/Documents/guidelines_reports/stop_and_search_policy_position.pdf> accessed 7th August 2011.

¹²³ Fenwick (fn7) 1436.

to an attack that is imminent and unavoidable by any other means'.¹²⁴ Sofaer (2003) supported the argument of Stevens (1989) who believed that "the necessity must be imminent, and extreme, and involving impending destruction".¹²⁵ This thesis would support some of Sofaer's and Steven's opinions to help determine whether s44 is proportionate and effective by adopting the following factors:

- (1) The nature and magnitude of the threat;
- (2) The likelihood of the threat being realised; and
- (3) The exhaustion of alternatives so that all other reasonable means of prevention have failed in order to make the use of s44 necessary.

Only when an 'action that is necessary and proportionate' is it *ipso facto* reasonable (Rodin, 2004: 764). Whilst meaning of 'necessity' will be considered in more detail later within this chapter, it is important to note that some scholars such as Sofaer (2003) believe that necessity, or necessary action, would occur when the threat is "imminent, and extreme, and involving impending destruction",¹²⁶ in other words the realisation of the threat would give proportionate rise to taking action. A further factor to consider is 'justifiability'. As Rodin (2004) explained, an element to the reasonableness test that goes beyond necessity and proportionality is whether it is 'justifiable to inflict such a risk upon this particular person?'¹²⁷ This question needs to be considered in the way that Rodin intended it to be looked at: '[t]he fact that the risks are necessary...and proportionate...is not sufficient to defeat the personal right not to be endangered or used in this way'.¹²⁸

The IPCC objectives mentioned above played no part when s44 was utilised and can therefore lead to the question: on what grounds did the police base their suspicions to stop and search under s44? Although s44 may have facilitated the police in their ability to manage and control threats of terrorism by being more proactive in the detection of terrorism (Peak, Bradshaw and Glensor, 1992: 26; John Yates, Counter Terror Expo 2010), the courts did not

¹²⁴ Abraham D. Sofaer 'On the Necessity of Pre-emption' 2003 *European Journal of International Law* 14(2): 209-226, 209.

¹²⁵ *Ibid*: 215. Also see: K R. Stevens 'Border Diplomacy: The Caroline and McLeod affairs in Anglo-American-Canadian relations, 1837-1842' (University of Alabama Press, 1989), 35.

¹²⁶ Sofaer (fn 124) 205, 215 and 216.

¹²⁷ David Rodin 'Terrorism without Intention' 2004 *Ethics: Symposium on Terrorism, Wars, and Justice* 114(4) (July): 752-771, 764.

¹²⁸ *Ibid*.

analyse the police conduct, their assessment of the threat or grounds for suspicion when enforcing s44. As discussed previously, whilst the change in policing style has been widely welcomed by many, including Peter Clarke the former Assistant Deputy Commissioner, the array of risks becomes evident. It can be concluded that s44 and similar pre-emptive counter-terrorism strategies are disproportionate and ineffective in their use. When using powers such as s44, safeguards such as those discussed in this chapter (accountability and transparency) should be provided for; ensuring the effective prevention of terrorism and remedy provision to those who suffer an abuse of process stemming from the measures enforcement.

Role of the courts in relation to crisis counter-terrorism policing powers.

There is support for the use of s44, notably at government level, despite the aforementioned risks of abuse of process and erosion of human rights (Zedner, 2007a; Fenwick, 2007). As mentioned earlier, the ECtHR in the *Gillan and Quinton* case recognised that s44 breached human rights, specifically Article 8 ECHR. Since 9/11 the use of s44 was authorised over the whole of London and remained in-force until it was repealed in 2011; even though the life-span of s44 was 28 days under s46 TA 2000, s44 was authorised on a rolling basis.

During the rolling programme of s44 in September 2003 at the Excel Centre in Docklands, East London, there was a Defence Systems and Equipment International Exhibition (henceforth “the arms fair”) which was the subject of protests and demonstrations. On the 9th September Mr Gillan, the first applicant in the *Gillan and Quinton* case, was riding his bicycle with a rucksack near the arms fair on his way to the demonstration. Under s44 two police officers stopped and searched him looking for articles that might be used in connection with terrorist related activity and although nothing incriminating was found print-outs about the demonstration were seized; a notice to this effect was served on him. Mr Gillan gave evidence explaining that the police explained to him that 'because a lot of protesters were about...the police were concerned that they would cause trouble'.¹²⁹ It was believed that Mr Gillan was detained for approximately 20 minutes. Later Ms Quinton, the second applicant, who is a journalist and was wearing her photographer’s jacket, camera bag and camera, was

¹²⁹ Gillan and Quinton (fn 15).

also stopped. Despite showing her press card she was told to stop filming and, like Mr Gillan, was also stopped and searched by the police. Both Gillan and Quinton were informed by the police officer that their powers to stop and search emanated from s44. Nothing was found to suggest either were connected to terrorist activity nor did their conduct give such suspicion; whilst police records recorded a stop and search of five minutes in length, Ms Quinton believed the detention lasted 30 minutes. She stated that the experience of being stopped and searched made her feel 'intimidated and distressed'¹³⁰ and unable to return to the demonstration; a potential risk identified earlier in this chapter.

In the first instance both applicants wanted to challenge the legality of s44 by way of judicial review. The Secretary of State offered them a procedure enabling a High Court review hearing in a closed court, facilitating the use of special advocates and the underlying intelligence that formed the basis of the Secretary of State's confirmation of s44; a process similar to the control order regime and TPIMs/ETPIMs which will be discussed in Chapter's Three and Five respectively. This offer was rejected as both applicants did not seek to question the assertion that there was a 'general threat of terrorism against the United Kingdom', instead they sought to challenge:

- (1) The authorisation and confirmation for use of s44, which formed part of a 'rolling programme of authorisations covering the entire London area'. The argument was that this was *ultra vires* and unlawful as Parliament had intended to only authorise s44 in response to an imminent terrorist threat, at a specific location for which ordinary policing would be inadequate;
- (2) The use of s44 at the arms fair was in contradiction to the Acts legislative purpose and unlawful in its application. With any communication and guidance given to police officers was 'non-existent or calculated to cause officers to misuse the powers';¹³¹
- (3) Authorisations of s44 and the execution of these powers by police was a disproportionate interference with human rights under Articles 5 and 8-11 ECHR.

¹³⁰ Ibid.

¹³¹ Ibid.

The Court of Appeal

The legal challenge by Gillan and Quinton arguing that s44 was an intrusive power on human rights, specifically Articles 5 and 8 ECHR, was defeated in each domestic UK court. It was the opinion of the Court of Appeal¹³² that it does not necessarily follow that the mere existence of this power results in a breach of human rights; rather it is the manner in which the power is exercised that creates the breach. It therefore follows that accountability of the police officers enforcing crisis powers, like s44, is a relevant factor for the court to take into consideration, yet the Court of Appeal also believed that the police should be allowed discretion in their enforcement of s44. The view of the Court of Appeal is concerning particularly when the Metropolitan Police Commissioner conceded that stop and search measures do amount to infringements with Article 8 ECHR; it was also accepted by the court that s44 is "an extremely wide power to intrude on the privacy of the members of the public".¹³³ This arguably shows the courts accepting there is an assessment to balance the rights of individuals with security, however in contradiction behave deferentially and favour security.

The Court of Appeal suggested frontline police should not only be accountable for their actions but be allowed discretion. It was also suggested accountability remains with the Secretary of State due to the safeguard of confirming the authorisation of s44. If this is correct, taking into account the observations by Lord Carlile QC in the Independent Terrorism Review (2007b) when he remarked that the Secretary of State should have refused the use of s44 on a number of occasions (2007b: 32, 115), there is a clear argument that the "safeguards" under s44 were ineffective.

Although the Court of Appeal discussed the importance accountability plays as a safeguard in policing, it did little to assess and consider matters relating to the deprivation of liberty. Instead the court spent much of its judgment supporting s44 explaining that the legislative safeguards were sufficient to prevent arbitrary actions and decisions being made. Ultimately

¹³² R (on the application of Gillian and another) v Commissioner of Police for the Metropolis and another [2004] EWCA Civ 1067.

¹³³ Ibid.

the court's opinion was sided with the government and that s44 could not be disproportionate; the "disadvantage of the intrusion and restraint imposed on even a large number of individuals by being stopped and searched could not possibly match the advantage that accrued from the possibility of a terrorist attack being thereby foiled or deterred".¹³⁴ The Court of Appeal also considered that in the case of Gillan and Quinton the location of the arms fair had been the scene of the attempted IRA terrorist attack in 1992, this being a CNI which has been explained earlier in this chapter. This supports the observation of Salter (2008) that the use of "imaginary numbers" help aid the argument for measures such as s44; emphasis must be given to the term 'imagination', the government, police and Security Services are unable to provide data that determines the quantification of terrorism because it is an uncertain threat. As a consequence of this, "catastrophic thinking" is used (Salter, 2008; Muller, 2008) to support the argument and need for counter-terrorism measures meaning that calculation of risk is based on the potential impact, which in terrorism cases will always be serious, rather than the frequency of such threats. Interestingly, Gearty (2005a) believed that the Court of Appeal revealed 'flickers of anxiety' concerning the implications of their reasoning to find s44 and its use as lawful.

The House of Lords

When being appealed from the Court of Appeal, the House of Lords¹³⁵ judgment was led by Lord Bingham, who considered whether stop and search created a deprivation of liberty as well as the applicant's argument that a rolling-programme of s44 amounted to *ultra vires*. Ultimately the House of Lords, as well as Lord Carlile QC in the Independent Review (2004), considered the rolling-programme acceptable because London itself is a 'special case' because it has a number of 'critical national infrastructures'.¹³⁶ The House of Lords failed to appreciate that a rolling-programme of s44 was arguably counter-productive to its underlying aims, ultimately if the threat does not exist then there should be no need for such a measure being enforced. Lord Bingham had some concern with the rolling-programme of s44 because it would become a product of a routine and bureaucratic exercise that would lack detailed consideration (Lord Bingham, paragraph 18). This was an early indication by His Lordship

¹³⁴ Lord Carlile QC of Berriew (fn 101).

¹³⁵ R (on the application of Gillian (FC) and another (FC)) (fn 99).

¹³⁶ Critical National Infrastructure (fn 120).

that s44 was becoming normalised because of the rolling-programme. This would mean that the emergency crisis power was being enforced when an emergency did not necessarily exist and was therefore arguably disproportionate to enforce.

In relation to the deprivation of liberty argument, Lord Bingham gave consideration to the general principles of *Guzzardi v Italy*¹³⁷ and found the stop and search process naturally has features that deprive a person of their liberty. Although, he considered deprivation under ordinary stop and search to be brief which would interrupt a person that “kept [them] from proceeding or kept waiting”,¹³⁸ it was viewed as a mere inconvenience, it was His Lordships belief, similar to Parliament, that had there been a deprivation of liberty, Article 5(1)(b)¹³⁹ would justify the deprivation because authorisation of s44 was “prescribed by law”.¹⁴⁰

His Lordship then gave consideration to the arguments surrounding Article 8 ECHR. It was felt that, similar to those with Article 5, if Article 8(1) were engaged, paragraph (2) would be satisfied. As stated by Fenwick and Phillipson (2010; 2011), Lord Bingham took a minimalist stance with the meaning of Article 8 as evidenced by his remark that “intrusions must reach a certain level of seriousness to engage the operation of the Convention”¹⁴¹ and took the view that “ordinary superficial search of the person...can scarcely be said to reach that level”.¹⁴² Whilst Lord Bingham believed that enforcement of s44 “must still be necessary in a democratic society, and so proportionate”, if the crisis power were authorised and confirmed (as prescribed by the TA 2000) then proper enforcement can be nothing other than proportionate (Lord Bingham, para. 344). This conclusion by His Lordship does not seem to have considered the issues of proportionality as discussed already. The House of Lords believed that s44 did not breach Article 8 because the search itself could not show a lack of respect for an individual’s private rights because the power was prescribed by law (ECtHR

¹³⁷ *Guzzardi v Italy* (1980) 3 EHRR 333; [1980] ECHR 5 (Service A. No. 39).

¹³⁸ *R (on the application of Gillian (FC) and another (FC))* (fn 99).

¹³⁹ Article 5(1)(b) European Convention on Human Rights: “to secure the fulfilment of any obligation prescribed by law...”.

¹⁴⁰ *Gillan and Quinton* (fn 15) [344].

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

decision, 2010: 28); one may argue that this deferential attitude by the House of Lords in *Gillan and Quinton* is an example of the laws against law risk as discussed in Chapter One.

The House of Lords considered that the safeguards and Codes of Conduct in place were sufficient to protect the public; therefore the police would not make arbitrary decisions. However, as argued earlier, without the appropriate test or standards the police were free to design their own selection process to suspect a person and the courts would not hold officer accountable for those decisions or actions. It was observed by Lord Hope that there was no legislative criteria under s44 that identified what the police officer's state of mind should be when they enforced s44. This means that the police could stop and search a person under s44 by using factors such as race, religion, or ethnic look (racial and religious profiling) despite there being no link between ethnicity and terrorism as discussed in Chapter One; despite this there is little the court would do. With the lack of proportionate safeguard, as discussed in this chapter, and only 'expedient' safeguards, the rolling-programme and conduct of the police when enforcing s44 was precautionary. The failure by the House of Lords to review proportionality regarding the enforcement of these crisis powers or the risks they create was obvious: they considered proportionality to be a question of whether the actions or measures are either advantageous or disadvantageous, for example "the travelling public are reassured by what they see when they see the police...at the barriers" (Lord Hope, ECtHR: 48).

The European Court of Human Rights

The House of Lords acceptance of a minimal application of Article 5 led Gillan and Quinton to take their case to the ECtHR.¹⁴³ It was rightly argued by Gillan and Quinton that the restriction imposed on a person's movement under s44 was intended to secure compliance. To determine whether a person had suffered a deprivation of liberty the ECtHR identified four criteria to be considered:

- (i) Type of detention;
- (ii) Duration of detention;

¹⁴³ Gillan and Quinton (fn 15) [344].

- (iii) Effects of the detention; and
- (iv) The manner in which the detention was implemented. (paragraph 56)

The court conducted a brief assessment of s44 as a close paradigm to deprivation of liberty cases relating to arrest and detention. The court focussed on the factors of compliance or coercion and considered the *Guzzardi* case and obtained support from *Foka v Turkey*:¹⁴⁴

"[Those searched] were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5(1)".¹⁴⁵

As mentioned earlier in this chapter, in the case *Austin v United Kingdom*¹⁴⁶ the ECtHR believed Article 5 was not applicable. The ECtHR reached its decision by considering:

- (1) The importance of not making it 'impracticable for the police to fulfil their duties of maintaining order and protecting the public';
- (2) Consideration to be given to the duty placed on the police to protect the public from violence and injury;
- (3) The context the measure is taken, for example members of the public may endure temporary restrictions when travelling on public transport.

This would mean that 'commonly occurring restrictions could [not] properly be described as "deprivations of liberty";¹⁴⁷ worryingly, if emergency crisis powers such as s44 were deemed normalised then the case could have failed. The court considered this on the basis that it was necessary to avert the risk of injury or damage. When taking into account the above factors, it would have arguably meant the ECtHR would have concluded s44 breached of Article 5. Whilst s44 may have assisted the police in the execution of their duty and role in countering terrorism, it was not possible to determine that the whole of London was at risk of a terrorist attack, nor that their deprivation would have been 'temporary'. Furthermore, and most

¹⁴⁴ *Foka v Turkey* (Application No. 28940/09); (24th June 2008).

¹⁴⁵ *Gillan* and (fn 15) [57].

¹⁴⁶ *Austin* (fn 116).

¹⁴⁷ Grand Chamber of the European Court of Human Rights judgment of *Austin and Others v United Kingdom*, press release by the Registrar of the Court (15th March 2012) <<http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3877995-4465858>> accessed 20th March 2012.

importantly, it was impossible to determine whether the enforcement of s44 was ever necessary because of the lack of safeguards, as this chapter has explored.

The UK government argued that s44 was the equivalent to checks at an airport, meaning that for members of the public to go about their daily activities they would have to comply with the commands made by police under s44, or face prosecution for disobeying the police; alternatively, they should not leave their homes. The government argued for the protection of the ‘greater good’ grounds explaining why such powers should prevail with the UK making reference to *Costello-Roberts v United Kingdom*,¹⁴⁸ arguing that not every act or omission of s44 would impinge on a person’s autonomy or integrity so as to amount to a serious interference with Article 8. When considering the application of Article 8 the ECtHR did not accept this line of reasoning, with reference to *Peck v United Kingdom*¹⁴⁹ the court remarked that just because a person leaves their home and enters a public place does not mean they automatically forfeit their right to privacy under Article 8. The court found, surprisingly unlike the House of Lords, that s44 did not satisfy the “in accordance with the law” test of Article 8 and held that there had been a breach of the ECHR. This related to the statutes lack of reasonable clarity: Article 8(1) was engaged because s44 searches were clear interferences with one’s private life, clearly suggesting the *Gillan and Quinton* case was not a borderline case (Fenwick and Phillipson, 2011).

When determining whether interference caused by s44 was in accordance with the law and necessary (as per Article 8(2)), it was held that it was not because s44 no longer used the ‘reasonable suspicion’ requirement: “[t]he powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subjected to adequate legal safeguards against abuse”.¹⁵⁰ The coercive nature of s44 enabled the ECtHR to identify the breach of Article 8 because the right to a private life also covers aspects of physical and psychological integrity and it found that a

¹⁴⁸ *Costello-Roberts v United Kingdom* [1994] 1 FCR 65; [1993] ECHR 16; 19 EHRR 112; (1993) 19 EHRR 112; (1995) 19 EHRR 112 (Application No. 13134/87).

¹⁴⁹ *Peck v United Kingdom* [2003] ECHR 44; [2003] Info TLR 221; [2003] EMLR 15; (2003) 36 EHRR 719; (2003) 13 BHRC 669; (2003) 36 EHRR 41; 36 EHRR 41 (Application Number 44647/98).

¹⁵⁰ *Gillan and Quinton* (fn 15) [85].

person subjected to s44 may suffer embarrassment or humiliation (paragraph 63); this is contrary to the findings of the domestic UK courts. The ECtHR found that the public should be made aware that this measure was being used so a person could regulate their approach to willingly participate with s44 rather than coercively, this could be achieved by having a safeguard of transparency. Ultimately, the ECtHR found that there were insufficient safeguards providing transparency, accountability and understanding of wider implications cause by this measure, points that thesis argues.

The concern for the UK government and judiciary from this decision was that the ECtHR placed human rights at a higher standard than the UK did. The decision made clear that broad, simple, lack of clarity and insufficient safeguards would result in emergency crisis powers to counter-terrorism being non-compliant with human rights. As mentioned earlier, following the ECtHR decision the Home Secretary replaced the s44 powers with provisions that would only be utilised when it was necessary rather than expedient. The decision to no longer use s44 was welcomed by many campaign groups such as Liberty and Human Rights Watch and remained in place until the publication of the MacDonald Report (2011).

RISK ASSESSMENT IN RELATION TO THE USE OF AND IMPACT OF 'CRISIS' STOP AND SEARCH POWERS

It is argued below that the use of these crisis powers can create various adverse effects and grievances (Home Office, 2011c). The Home Office documented that grievances were held by the public because "the public are most likely to have direct experience"¹⁵¹ of crisis powers like s44, undoubtedly the same can be said for s61. The Impact Assessment by the Home Office (2011c) suggests that the perception of s44 was that it would be disproportionately used against people from Asian communities, although as statistics will show below Caucasian people were more likely to be stopped and searched under s44. Despite this, there were concerns that s44 would "fuel perceptions that the police employ

¹⁵¹ Home Office 'Terrorism Stop and Search Powers (Section 44 of the Terrorism Act 2000) Impact Assessment' (18th January, 2011c) HO0033 <<http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/ia-terrorism-stop-search?view=Binary>> accessed 15th April 2012.

racial profiling"¹⁵² and such counter-terrorism crisis powers were being used against all aspects of society. Counter-terrorism crisis powers, like s44, also result in 'suspect communities' (Greer, 2010; Fenwick, 2010) which is arguably fuelled by the perceptions of how terrorist suspects are identified. The decision of the *Gillan and Quinton* case lead the Home Office to reassess the use of crisis powers like s44; this was aided by the completed Impact Assessment which demonstrates that the Home Office (2011c) believed powers like s44 should be proportionate.

As explored previously when discussing the *Gillan and Quinton* case, counter-terrorism crisis powers would only be considered proportionate under Article 8(2) ECHR¹⁵³ when it is necessary for the interests of national security or public safety. The Home Office Impact Assessment (2011c) of s44 seems to accept that there is a link between the risk assessment of crisis powers and the proportional use, although it is important to remember s44 was adjudged by the ECtHR as not being proportionate, breaching Article 8 ECHR. The UK courts failed to consider the negative impact s44 may cause, compared to the ECtHR who recognised the risks that a person stopped and search under s44 may suffer, specifically embarrassment and harassment.

As mentioned earlier in this chapter, this thesis believes that had the courts considered the risks posed by s44 they may have reached a different view, similar to the ECtHR. Risk assessment is a vital tool to aid in the determination of whether an act, omission or idea is proportionate and is one that can be used in counter-terrorism, similar to the criminal justice system. For example, risk assessment can be seen as being similar to plea-in-mitigation at an offender's sentencing hearing when defence counsel outlines the offender's family history and personal circumstances to explain why the offence has been committed, or issues that may explain the offending behaviour so a proportionate and fair sentence may be imposed.

¹⁵² Ibid.

¹⁵³ Article 8(2) European Convention of Human Rights: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well0being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Failure by the courts, police and government to understand and recognise the potential and actual risks caused by measures, such as s44, through a holistic assessment means effectiveness of a measure cannot be truly understood. The threat of terrorism is not just felt or experienced in one part of the UK, there has been a terrorist attack in Scotland in 2007 when Bilal Abdullah and Kafeel Ahmed attempted to blow up Glasgow Airport with a car bomb. Despite this attempted terrorist attack Scotland has never authorised the use of s44 (Lord Carlile QC, Independent Terrorism Review, 2009). A reason why the UK courts might be unwilling to question in detail the conduct and thought processes of the police when enforcing s44 might be best explained by Lord Bingham in the *Belmarsh* case,¹⁵⁴ in which he believed the assessment of the risk or threat of terrorism and appropriate course of action requires political resolution and is not a legal matter; this means that the courts should play a smaller role (Lord Bingham, *Belmarsh* case: paragraph 29) and supports the argument of the courts deferential attitude in favour of government.

Given that s44 was enforced when it was ‘expedient’ to do so, the meaning of which was explored in the *Gillan and Quinton* case and discussed earlier in this chapter, the courts would be unable to assess the subjective opinion of the police. This is another example of deferential attitude, however this was supported by the act itself. It would therefore mean that difficulty exists for the applicants to establish *ultra vires* or abuse of power allegations against the police when they enforce s44. It is the belief of this thesis that the ECtHR understood the need to clarify under what circumstances s44 would be needed, which this thesis aims to show is done through a test of necessity or immediacy of a threat.

S44 had no formal requirement that established the proximity of time to the threat materialising. It therefore supported the UK government’s war model approach to counter-terrorism as discussed in Chapter One. As a consequence of this a huge negative impact would have been felt by ethnic minorities, or so believed, and would have caused an indirect negative perception of the police. When one considers the terrorist attacks post-9/11 the predominant stereotype of a terrorist has been associated with origins from the Muslim Community. Edwards and Gomis of Chatham House (2011) confirmed that surveys show that

¹⁵⁴ *A and Others v Secretary of State for the Home Department*; *X and Another v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

amongst British Muslims there are extremist views that support Sharia Law or Muslim caliphate in the UK. A British documentary for Channel 4 found 'a third [out of 1,000 Muslims] would prefer to live under Sharia Law, and some 40% said Britain was a country of bad moral behaviour'.¹⁵⁵ These were understood not to be mainstream views of UK government and 'considered extreme when compared with Western values'.¹⁵⁶ It must be remembered that despite a third of 1,000 Muslims held these views there was no evidence that they or a large number of Muslims support terrorist-related violence (Edwards and Gomis, 2011). The stereotyping of terrorists has caused some to call upon the Muslim Community to play a great role in counter-terrorism, the then British Prime Minister, Tony Blair MP, stated before the Commons Liaison Select Committee:

'...if you want to defeat this extremism you have to defeat its ideas and you have to defeat in particular a completely false sense of grievance against the West. That has to be done, yes, by Government but it also has to be done by mobilising that moderate majority within the Muslim Community to go into the community and take these people head-on, not just in terms of their methods but also in terms of their ideas, in terms of their sense of grievance against the West, the whole basis of that ideology, because this is a global ideology that we are fighting.'¹⁵⁷

This commentary by Tony Blair MP to some extent denounces the use of extremism and gives support for the use of community action. However, this remark may inflame attitudes by dismissing Islamic ideologies and the opinions some may have of the West and Britain. The concern here is that attitudes such as his and counter-terrorism measures, such as s44, create a perpetual cycle of resentment, reinforcing arguments that the Muslim community is unfairly targeted by Western governments which can be used to aid in radicalisation. This is a further example that profiling and stereotyping place unnecessary strain on community relations and individuals. A respondent¹⁵⁸ to a survey carried out by Pickery et al (2008) expressed his opinion on this issue best:

¹⁵⁵ Jay Edwards and Benoit Gomis 'Islamic Terrorism in the UK since 9/11: Reassessing the 'Soft' Response' 2011 Chatham House (June) – International Security Programme Paper (ISP PP 2011/03), 16.

¹⁵⁶ Ibid.

¹⁵⁷ Liaison Committee 'Rt Hon Tony Blair' 2005-2006 (4th July 2006) House of Commons <<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmliaison/709/6070404.htm>> accessed 7th September 2013.

¹⁵⁸ The identity of the respondent to the survey is unknown due to the confidential nature of the survey, however the respondent is known to be male, aged between 35 and 45 and of Middle Eastern origin.

"violence by anti-apartheid groups in South Africa did not make white people in Australia criminal if they supported the anti-apartheid cause. So why am I made to feel like a criminal because others use violence in the name that I also happen to support? Supporting the cause is not the same as supporting the violence. Why am I not allowed to have views because of the actions of violent criminal like Bin Laden?"¹⁵⁹

It is clear from examples given including those by government ministers mentioned in this chapter and Chapter Two, post-9/11 profiling has stigmatised ethnic minorities; Lord Carlile QC in the Independent Terrorism Review (2009) suggested that s44 should be used in such a fashion that an 'ethnic imbalance' should be the trend, believing this would have been a 'proportional consequence of operational policing'.¹⁶⁰ Despite this, statistical data by the Home Office (Tables A, B, C.1, C.2, D, E and F) shows that the large majority of those stopped and searched did not have a ethnicity that one may consider not to correspond with the post-9/11 terrorist stereotype. Whilst those convicted for terrorist offences and subsequently imprisoned do fit within the ethnic stereotype. Tables A-F show that those that face trial and are dealt with via the traditional criminal justice system are more likely to fit the stereotype, compared to those affected by pre-emptive measures like s44.

As previously mentioned in this chapter, s44 had no assessment process to determine suspicion which was a lacking safeguard the ECtHR was critical of; s61 provides a degree of assessment. Under s61 an assessment of the risk is required and places a level of accountability with the authorising officer who completed the assessment. Despite this, it is still possible that fear of the threat may affect the risk assessment itself, however this is a positive step in creating safeguards. This risk assessment that needs to be undertaken before acting can mean that the action taken is more likely to be proportionate. One may argue that in light of the *Gillan and Quinton* case and process adopted under s61, when enforcing emergency stop and search powers the police should use existing powers under the ordinary criminal justice system (eg s1 PACE); this would be fairer, just and balanced in tackling terrorism. As discussed previously, ordinary stop and search powers requires the police to

¹⁵⁹ Sharon Pickery, Jude McCulloch and David Wright-Neville 'Counter-Terrorism Policy: Community, Cohesion and Security Communities Respond to Counter-Terrorism Policing' in 'Counter-Terrorism Policing' (Spriner, 2008), 113.

¹⁶⁰ Lord Carlile QC of Berriew (fn 88) 140.

formulate reasons when enforcing their powers, using such an approach when deciding to stop and search terrorist suspects is likely to reduce any possible risk of racial and religious profiling from prejudicing an officers judgment. It would not require the enactment of new legislation and would return to the preferred community style policing as discussed earlier in this chapter.

Racial and religious profiling.

As discussed earlier, the use of stereotypes creates a risk of profiling which may result in the creation of suspect communities; this is seen regularly within the context of terrorism. Walker (2008) accepts that profiling plays an important role in identifying who to stop and search but is mostly used in circumstances where there is an absence of intelligence. Profiling may be based on behaviour such as purchasing one-way tickets, travelling to known Islamist extremist countries or flying lessons; although one would suggest alone neither would be sufficient to identify a potential terrorist. However, a perceived stereotypical terrorist is formed from a person who looks as though they are from an Asian ethnicity or Islamic faith (Schneider and Susser, 2003; Marcuse, 2006: 920). There are examples of terrorist attacks that illustrate it is not possible to stereotype terrorists. Walker (2008) commented that 'whilst foreigners remain a threat, the menacing figures in the contemporary stage of terrorism are often our neighbours from within'.¹⁶¹ Hemmingby (2013) explained at the Counter Terror Expo Conference 2013 that a new modern terrorists has evolved: 'solo-terrorists'. These are terrorists who are not directly linked or associated to a terrorist organisation but support the organisations extreme ideologies and carry out attacks on the organisations behalf (Hemmingby, 2013); this is similar to the 'lone-wolf' idea (Hemmingby, 2013; Gomis, 2012; Gomis, 2013a; Walker, 2013). The 7/7 London Bombings were carried out by terrorists¹⁶² who were British born, second-generation young Muslims who came from well-educated and wealthy backgrounds with stable family homes. Whilst this may illustrate those stereotypes of modern terrorists originating from Islamic backgrounds, there are terrorists who are not isolated aberrations who are British citizens and plan to engage in terrorist activity at home and on foreign jurisdictions who do not originate from a Muslim background, for example

¹⁶¹ Clive Walker 'Know thine enemy as theyself': Discerning friend from foe under anti-terrorism laws' 2008 Melbourne University Law Review 32: 275-301, 276.

¹⁶² The bombers of the London 7/7 Bombings in 2005 are recorded as: Mohammad Sidque Khan, Shehzad Tanweer, Germaine Lindsay and Hasib Hussain.

Richard Reid. In 2001 Reid earned his title as the ‘Shoe Bomber’; he came from a Jamaican family background, born in the UK and after a lifestyle of criminal activity he converted to Islam. A further example is Adam Yahya Gadahn who was born in Oregon into a family with Jewish ancestry and raised in California and was educated in a Christian environment; he has appeared as one of the FBI’s most-wanted American members of al-Qaida.¹⁶³ Edwards and Gomis (2011) considered twelve British terrorists and terrorist plots, within each there were factors about each terrorist that would not necessarily fit the stereotype.

Post-9/11 the stereotypical terrorist has been depicted on the imagery of Osama bin Laden, a person who is viewed 'as an alien, uncivilised cave-dweller'¹⁶⁴ or a mentally unstable or vulnerable person (Walker, 2008). Following the 9/11 and 7/7 attacks there is evidence and recognition of home-grown terrorists which supports the argument that a stereotypical terrorist profile cannot be created because a terrorist does not necessarily come from an obvious ethnic group. As previously explained, Hazel Blears MP and Lord Carlile QC believed an ethnic imbalance against the Muslim people should have been seen during the enforcement of s44, however Home Office statistics (see Tables on pages 83-88) doesn’t support this; does this mean that the police weren’t enforcing s44 correctly?

The stereotypical view of a terrorist or the terrorist profile held by Hazel Blears, Lord Carlile QC and others is profiling known as ‘racial profiling’ and is described as:

'[w]hen race or nationality is used as a factor in determining whom to stop, search, question, or arrest – whether in an investigative stop and frisk, a motor vehicle pretext search, or a security search – unless there is a suspect-specific or crime-specific exception to this general rule'.¹⁶⁵

Walker (2008) accepts that profiling exclusively based on race, ethnicity or religion does 'not constitute a useful counter terror tool'.¹⁶⁶ Although such stereotypes exist, Lord Carlile QC

¹⁶³ Federal Bureau of Investigation Most Wanted Terrorists, Profile of ‘Adam Yahya Gadahn’ <http://www.fbi.gov/wanted/wanted_terrorists/adam-yahya-gadahn> accessed 14th January 2012.

¹⁶⁴ Walker (fn 161).

¹⁶⁵ Deborah A. Ramirez, Jennifer Hoopes and Tara Lai Quinlan 'Defining Racial Profiling in a Post-September 11 World' 2003 American Criminal Law Review 40: 1195, 1206. Also see Walker (fn 161) 289.

¹⁶⁶ Walker (fn 161) 289.

confirmed that s44 was being used either poorly or unnecessarily against individuals who were 'obviously far from any known terrorism profile that, realistically, there is not the slightest possibility of him/her being a terrorist'.¹⁶⁷ As such, Lord Carlile QC criticised the use of s44 because the measures was being used more towards ethnic minorities and was therefore disproportionate. He formed the view that s44 was not being used as a measure to counter-terrorism, rather an instrument to "balance the statistics" (Lord Carlile QC in the Independent Terrorism Review, 2009: 142); an attempt to remove the label of being institutionally racist.¹⁶⁸ Lord Carlile QC failed to consider that the broad power of s44 provided sufficient ambiguity to enable the police to use it disproportionately.

Whilst it can be argued that suspicion should arise from many factors, it should not be based solely on racial origins or ethnicity; Walker (2008) suggests that this should be acceptable or achievable when considering the perceived threat otherwise the selection or suspicion process used would be inherently discriminatory (Walker, 2008:290). Here, Walker fails to explain who should identify the perceived threat, if it is the government then based on his point the perceived terrorist threat has always existed and would mean stopping and searching a person based on their ethnicity alone would be acceptable. If however the police were to perceive the threat, then the risk that police would be capable of using their intuition or the 'copper's nose', would also result in disproportionate conclusions. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)*¹⁶⁹ ('Roma case') the House of Lords found that it was unlawful to target Roma passengers at Prague Airport, as they had been "routinely treated with more suspicion and subjected to more intensive and intrusive questioning" compared to other potential asylum-seekers because of their ethnicity. Lord Brown distinguished the *Gillan and Quinton* case from the *Roma* case, remarking that there was no other factor in the minds of immigration officers other than to stop a specific race of people, whilst those police enforcing s44 do not just solely focus on ethnic origins of suspects when deciding to enforce s44 (Walker, 2008: 290). Lord Brown failed to identify that s44 does not require the police nor allow the courts to determine on what factors the police base their suspicion to enforce s44,

¹⁶⁷ Ibid 289.

¹⁶⁸ Macpherson Report: The Lawrence Inquiry as referred to by Miller, J. (2010) 'Stop and search in England: a reformed tactic or business as usual?', *British Journal of Criminology*, 50(5): 954-974, page 954.

¹⁶⁹ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2005] 2 AC 1.

given the opinion of government ministers and Lord Carlile QC there is a clear focus on ethnicity.

During the *Gillan and Quinton* case the House of Lords confirmed that the police should not base their decision to enforce s44 solely on race or ethnicity. With no statutory safeguard under s44 preventing the use of racial profiling, the police may base suspicion on these factors. One would argue that the UK courts should have and had power under the TA 2000 to question the use of s44. If the courts are unable to determine whether s44 is enforced proportionately and fairly without unfounded prejudice, then they are unable to hold the police accountable for their actions. One would suggest that despite the differentiation made by the House of Lords between the *Gillan and Quinton* case and the *Roma* case, s44 was publically intended for ethnic groups which highlight the discriminatory nature of stereotyping terrorism. Clearly the only way to prevent individuals from being stereotyped and being subjected to the disproportionate effects of s44 is through clear intelligence, tests for police to formulate suspicion (eg reasonable suspicion) and power for the court to independently assess the use of such powers.

Section 44 enabled the police to make arbitrary decisions.

Whilst s44 was being challenged, it was being argued that the measure was an ineffective method of countering terrorism. As described earlier, S44 was a pre-emptive measure and by its nature of using suspicion, removing and ignoring the need of *mens rea* as found in ordinary policing, it utilised a wider '*probabitis reus*' (Amoore and de Goede, 2008). With police being able to design their own grounds of suspicion, a reserve burden of proof became established which would require suspects to separate themselves from the 'risky' with the 'at risk' etc (Edkins and Pin-Fat, 2004). Ultimately, if suspects fail to satisfy police suspicion that they are a terrorist, they would likely remain a suspect.

With a lack of intelligence or guidance s44 was broadly applied, which was disproportionate and discriminatory, as mentioned earlier. S44 was used to control the public in circumstances where there is no known threat of terrorism, therefore became a generic police operational

tool when normal policing could not be used due to the safeguards in place. The abusive use of s44 can be illustrated by the case study of Walter Wolfgang who in 2005 was 82 years old when he attended the Labour Party Conference, with whom he was politically associated to. He heckled Jack Straw MP the then UK Foreign Secretary on issues relating to the War in Iraq; Walter Wolfgang was forcibly removed and detained under s44. Whilst one may argue he was obviously not a terrorist, his detention was based on his behaviour towards Jack Straw MP and not behaviour that might be construed as akin to terrorism. This thesis has consistently argued within this chapter that where there is a lack of intelligence or evidence, enforcement of s44 should not have taken place. If intelligence were adequate s44 would have been targeted towards specific suspects, it would have remained being a pre-emptive measure and whilst becoming more preventative.

Using an 'imminent threat' test rather than 'reasonable suspicion' to create police accountability.

S61, the replacement for s44, can only be authorised when a senior police officer 'reasonably suspects' an act of terrorism will take place (s61(1)(a) PoFA 2012); one may argue that such decisions can only be reached with the support of intelligence. Not only is this seen through ordinary stop and search powers (s1 PACE) but it was one of the lacking safeguards under s44, which this chapter has persistently argued. However, the authorising officer also needs to consider whether the authorisation is 'necessary to prevent such an act' (s61(1)(b)(i)), which itself requires analysis of whether an act is imminent and therefore pre-emptive action is required. Further consideration of the specific area or place and duration of authorisation is required (s61(1)(b)(ii) and (iii)) and this should not be greater than 'necessary'; providing an assessment of proportionality under s61. Under the PoFA 2012 the authorising officer has greater accountability placed upon them and is underpinned by the responsibility placed upon them to risk assess the terrorist threat. Whilst the initial test is reasonable suspicion, the ultimate determination by an individual officer whether or not to enforce s61, can only be formulated with knowledge of the immediacy of the threat and therefore the risks involved, which should be disseminated from the authorising officer to frontline police.

Although the assessment of whether the threat is imminent is not a required consideration, it still means that the police can authorise and enforce crisis powers under s61 when there is no cause to do so. The low standard of ‘reasonable suspicion’ allows the police to authorise and enforce the use of crisis powers in the absence of an ‘imminent threat test’. The implementation of the crisis powers requires that the authorising and enforcing officers have the ability to accurately predict the threat and risk to allow them to determine the proportionate response in pursuit of security. This is a characteristic of pre-emptive measures as discussed earlier in Chapter One.

Whilst making the police more accountable through legislation the courts can play a vital role. The courts should be capable of questioning the police about their conduct and decisions, particularly when under s44 there was evidence of disproportionate use and intended discriminatory enforcement. The suggested use of the ‘coppers nose’ (Walker, 2008) would arguably enable only the experienced officer to formulate a suspicion of terrorist activity. This would be likely to result in similar prejudicial decision making similar to s44, particularly if suspicion were formulated in the absence of intelligence. When stop and search is grounded on the standard of ‘reasonable suspicion’ as required by s1 PACE, stop and search cannot be based on personal or individual factors alone without using reliable intelligence. The provision of a guiding test or standard enables the prevention or limitation and detection of those police who base suspicion of suspects on notions, ideas, generalisations or stereotypes (Walker, 2008) reducing the risk of arbitrary decision making at the frontline, for example the authorising officer disseminating evidence/intelligence to frontline officer as explained above.

S44 itself is an example of an arbitrary process intended to give more power to the government and its emanations and identifies such powers as crisis powers. This supports the argument of Edkins and Pin-Fat (2004) and Amoores and de Goede (2008) that sovereign powers are being dispersed rather than centralised, powers which may also be seen as a form of ‘complex assemblage’. Without a risk based analysis, which this chapter has explored in detail, crisis powers such as s44 create a quasi-judicial role for the police. Butler (2004) terms this process as ‘petty sovereignty’ through which the police would be seen as a bureaucratic institution that has been empowered to decide who to detain and arrest without legal recourse

for their decisions when they become disproportionate or abused. Furthermore, Cameron (2006) explains that when a norm is not laid down, it is not possible for the police to breach what would be considered the norm which would subsequently mean there is no legal recourse available against the police. The risk of no remedy being available, as Vlcek (2006) assessed, would mean that there was "...no avenue to recover their [the suspect's] presence in society".¹⁷⁰ This collectively becomes akin to Agamben's (2005) '*homo-sacer*' theory, as discussed in Chapter One. In other words, once a person is stigmatised as a "terrorist" and are unable to prove on the spot that they are not a terrorist, they have little or no legal recourse to remedy this and lose their identity in society. Given that the UK courts were deferential to the authorisation and enforcement of s44 (see *Gillian and Quinton* case discussion above), it was impossible for any member of the public to regain a positive status in society once they had already been suspected of posing a threat.

With the police and executive being capable of profiling suspects support is given to the idea of 'petty sovereignty' as discussed above, merges with the ideas of 'governmentality' as Butler (2004: 59) describes: "they are...part of the apparatus of governmentality; their decision, the power they wield to 'deem' someone dangerous and constitute them effectively as such, is a sovereign power, a ghostly and forceful resurgence of sovereignty in the midst of governmentality".¹⁷¹ As the government confirmed the use of s44 the police enforced it; as the police could no longer be described as citizens in uniform, instead agents of the state or state police when using such crisis powers, too much power can be seen as being yielded by the government. S44 enabled the state to label everyone as a risk, discriminate against some, argue it was all in aid of national security and provide no remedy to those falsely accused.

Is 'expediency' or 'imminent threat' an appropriate test to use?

To reduce the risk of viewing all members of the public as terrorist suspects pre-emptive powers, like s44, should only be enforced when supported by intelligence and there is an imminent threat. The lacking of such provisions was shown in s44(s)¹⁷² was criticised in the

¹⁷⁰ W Vlcek 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice' 2006 European Foreign Affairs Review 11(4): 491-507, 506. Also see: Amoores and de Goede (fn 5) 109.

¹⁷¹ Vlcek (fn 170) 506. Also see: Amoores and de Goede (fn 5) 109.

¹⁷² Terrorism Act 2000, section 44(3): "expedient for the prevention of acts of terrorism".

Gillian and Quinton case, as previously mentioned. What this chapter has consistently shown, the use of s44 was a reaction of fear and the unknown, so for the government to take control and manage this 'unknown threat' they had taken a precautionary approach. The use of fear to drive government to enact effective counter-terrorism powers results in ineffective decision-making. Fear is considered a result of the unknown, Grotius (2006) stressed it is not enough to fear the attack, but argued there needs to be a 'degree of certainty',¹⁷³ that the attack will happen or is imminent.

Supporters of the Just War Model ordinarily support Grotius and believe that the immediacy of a threat is an important guide on whether pre-emptive action would be justified; as explained by Grotius: "War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed".¹⁷⁴ It was remarked by Fisher and Wicker (2010) that the doctrine of pre-emption is objectionable because its natural presumption favours action against a threat rather than imminence of that threat (2010: 85), this is a fundamental risk of pre-emption. As observed by Grotius (2006):

"Fear with respect to a neighbouring power is not sufficient cause. For in order that defence may be lawful it must be necessary and it is not necessary unless we are certain not only regarding the power of our neighbour but also regarding his intent, the degree of certainty being what is accepted in moral matters".¹⁷⁵

Ultimately, a safeguard such as 'imminent threat test' would ensure that measures such as s44 are not used on the back fear and the need to regain control until the threat is likely to be realised. Unlike senior police or the authorising officer (as per s61), the Secretary of State, would be capable of holistically assessing the gravity of the threat, high probability of its occurrence, the effect the measure would have on the UK Strategy and proportionality of enforcement. If a threat was imminent then one would argue it would be reasonable to believe there is intelligence to suggest that 'time was of the essence' and alternative action, such as preventative measures, might not be enough therefore pre-emptive action is required – an

¹⁷³ David Fisher and Brian Wicker 'Just War on Terror?: A Christian and Muslim Response' (Ashgate Publishing 2010).

¹⁷⁴ H Grotius 'De Iure Belli ac Pacis' in G M. Reichberg, H Syse and E Begby (eds) 'The Ethics of War' (Oxford: Oxford University Press, 2006), 403. Also see: Fisher and Wicker (fn 173) 86.

¹⁷⁵ Grotius (fn 174). Also see: Fisher and Wicker (fn 173) 86.

argument supported by Grotius (2006) and Fisher and Wicker (2010). A test of imminence has been supported for quite some time and under international law and practice states accept that other states should not suffer an attack if they are capable of lawfully protecting themselves in the presence of imminent dangers of attack; scholars and jurists condition the lawfulness and legitimacy of pre-emptive action on the existence of an imminent threat materialising, even if there remains uncertainty in the time and place of an attack anticipatory action to protect the state when an attack is known/expected to take place (Fisher and Wicker, 2010: 83-84).

There may be some who argue that requiring a test of an 'imminent threat' before taking pre-emptive action can be justified. Some scholars such as Fisher and Wicker (2010) suggest that the best form of assessment should be the gravity or degree of danger posed by an imminent threat and this should justify pre-emptive action. One may argue that supporters of this approach fail to understand that the gravity or danger posed by terrorism may always exist but may not be realised for some time if at all. If this approach were followed the UK would remain in a constant state of fear and enforce counter-terrorism measures which support the Just War Model. Just War theorists believe that imminent threats assist in identifying what sort of measure would be an appropriate and proportionate measure to take: pre-emptive or preventative.

As has been suggested in this chapter, pre-emptive action should only be taken because intelligence is available to suggest the threat is imminent, otherwise if it is not utilised cautiously it can lead to abuse as demonstrated by s44 when enforced. It is believed by some, such as Bobbitt (2009),¹⁷⁶ that there are circumstances where pre-emptive action remains an absolute necessity to manage or control a threat (Fisher and Wicker, 2010). Although it is understandable why one may conclude this, although one would argue, it needs to be applied with caution and those who authorise, confirm and enforce measures such as s44 need to be accountable.

¹⁷⁶ Phillip Bobbitt 'Terror and Consent: The Wars for the Twenty-First Century' (Penguin, 2009).

Whilst pre-emptive action remains a necessity to aid the state in its 'War against Terror' it must be fashioned to ensure that any harm caused is proportionate to the averted threat and is effective in the short term and long term goal of the UK Strategy. By not having a test or similar safeguards to assess and provide such assurances s44 provided police with a quasi-judicial role, as discussed earlier. If intelligence suggested that an attack was expected to destroy an architectural monument pre-emptive action might be proportionate. There are some that suggest a test based on the gravity of a threat having high probability of occurring, a test based on the threat being imminent remains a better one. A test of imminence encompasses both proportionality, the threat being realised in a short space of time and the need to have emergency powers will be for the limited period of time that the threat is expected to be realised. If a terrorist threat is believed to happen, then it goes without saying the threat is of serious gravity and the determination of probability that a threat will take place is an assessment of the credibility of the intelligence and evidence obtain (Fisher and Wicker, 2010). Given the broad powers of s44 and the criticism raised in this chapter regarding accountability, a structure of accountability should be identified; this may be similar to those that form the Terrorism Review Group, as discussed in Chapter Five. With this structure the court be able to see what intelligence has been obtained.

The importance of intelligence and its relevance in identifying suspects to stop and search under crisis stop and search powers.

Ordinary stop and search is naturally based on intelligence because this is how the police form 'reasonable suspicion', however intelligence for crisis powers may be used and if so may originate from domestic sources as well as international sources. The latter raises risks of origins of the intelligence and how it was obtained, more so after the allegations made by Human Rights Watch in August 2011 following the rebel revolt of Libya 2011. It was alleged that UK Security Services were complicit and knowingly accepted intelligence that had been obtained by means of torture; although this is a topic of debate for others, it will be touched upon in more detail when considering the Deportation with Assurances ('DWA') measures in Chapter Four. In essence questions of the risks relating to the validity and reliability of intelligence used to authorise and legitimise s44 are raised. Intelligence facilitates a person's ability, like the authoriser of crisis powers, to assess the risks involved and the threat itself and consequently determine whether the authorisation of crisis powers is proportionate or

not. Despite this logical idea, Walker (2008) believes that no matter how vague in detail intelligence is, the responsibility, post-authorisation of crisis powers, lies solely with the frontline police and it is for them to evaluate the intelligence and authorisation to determine where and when crisis powers may be used. One may disagree because this still provides the police unaccountable decision making powers, and argue that the authorising officer of any crisis powers and the Secretary of State should be held responsible to clearly communicate to frontline officers:

- (i) what intelligence has been received;
- (ii) what intelligence provides so that they may formulate suspicion; and
- (iii) the relevance and applicability of that information to authorise the use of measure such as s44 and s61.

In doing so they create clear lines of communication and transparency of information, identifying the profile of a suspect, this in turn means the police can establish reasonable suspicion to stop and search a terrorist suspect under s43 or ordinary stop and search powers rather than using wide measures such as s44. It would also create accountability from those who provide the information, its communication and distribution and its use by the police to formulate grounds of suspicion to stop and search; this would make each player accountable for their role for using such emergency powers. When dealing with intelligence there is support for the idea of improving accountability; Isaacson and O'Connell (2002) and Cutter, Richardson and Wilbanks (2003) believe that intelligence can be "highly fragmentary, lacking in well-defined links, and fraught with deception"¹⁷⁷ and therefore intelligence requires analysis to support counter-terrorism measures such as s44. Failure to clearly communicate these matters with frontline officers, and for frontline officers to enforce s44 according to the intelligence, could lead to legal challenges, as accepted by LJ Brookes in the High Court of the *Gillan and Quinton* case. In ordinary circumstances if police received vague intelligence this would be used to support the police to have reasonable suspicion to stop and search members of the public under s43 or s1 PACE.

¹⁷⁷ Susan L. Cutter, Douglas B. Richardson and Thomas J. Wilbanks 'The Geographical Dimensions of Terrorism' (Routledge, 2003) 131. See also: Jeffery A. Isaacson and Kevin M. O'Connell 'Beyond Sharing Intelligence, We Must Generate Knowledge' (RAND Review, 2002) 26(2).

If s44 were authorised in circumstances where there is a lack of intelligence available its use becomes, as Aradau and van Munster (2008) explain, a '*dispositif* of precautionary risk' upon which visions of a disastrous future are envisaged; this is also known as 'availability heuristic' where there may be inaccurate assessments of the probability or likelihood that a risk will come to light and stems from events and instances when the risk might be repeated (eg 9/11 anniversary) (Amoore and de Goede, 2008). In such circumstances where there is a lack of intelligence s44 may well be deployed to profile people and their practices in order to detect suspects (Yaghmanian, 2006; Amoore and de Goede, 2008), build possible terrorist profiles or obtain intelligence; Yaghmanian (2006) recalls his experience of this having to him when travelling in America:

"The car being clean, they now turned to my life, which was far harder to search. They questioned me about my identity, activities, exchanges and purchases, friends, travels and above all what made me different from the men and women allowed to zip across the border without question or a thought. Every card, every piece of paper in my wallet was checked. I was asked to explain my credit card receipts. A bill for \$500 from a small-town garage for the purchase of four new tyres aroused suspicion and led to more questions. A receipt for an airline ticket to Atlanta raised alarm. 'What was the purpose of your trip to Atlanta?' asked the officer. 'A book I had written was featured at a conference,' I replied. What, he asked suspiciously, was the subject of that book?"

A further problem that Walker (2008) fails to understand is that s44 was not authorised on a 'force-wide' basis due to the cultural diversity of the United Kingdom. One would say this is because one type of measure does not necessarily fit all; this is exemplified by Scotland not enforcing the s44 power.

TABLE A – Home Office, 'Operation of police powers under Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches'¹⁷⁸

Self-defined ethnicity	2008/2009				2009/2010				Totals	
	Apr – Jun	Jul – Sep	Oct – Dec	Jan – Mar	Apr – Jun	Jul – Sep	Oct – Dec	Jan – Mar	2008/2009	2009/2010
White	60	141	380	241	196	210	139	109	822	654
Mixed	3	3	11	7	11	9	7	6	24	33
Black or Black British	13	47	109	53	45	33	16	29	222	123
Asian or Asian British	25	62	126	110	64	80	69	79	323	292
Chinese or Other	5	14	23	28	4	14	15	10	70	43
Not stated	20	17	69	34	22	28	15	14	140	79
Total	126	284	718	473	342	374	261	247	1601	1224

¹⁷⁸ Home Office 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches' 2009-2010 (28th October 2010), Home Office Statistical Bulletin, HOSB 18/10 <<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs10/hosb1810.pdf>> accessed 10th September 2011.

TABLE B – Home Office, 'Operation of police powers under Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches'¹⁷⁹

Area	Year	Quarter	Self-defined by ethnicity						Total
			White	Mixed	Black or Black British	Asian or Asian British	Chinese or Other	Not stated	
England & Wales	2009/2010	Apr – Jun	17,372	628	3,169	4,741	1,171	1,646	28,727
		Jul – Sep	14,615	524	2,688	3,621	1,165	1,137	23,750
		Oct – Dec	10,629	358	1,811	3,525	745	854	17,922
		Jan – Mar	7,931	341	1,436	2,728	552	744	13,732
		Total	50,547	1,851	9,104	14,615	3,633	4,381	84,131
Great Britain	2009/2010	Apr – Jun	21,689	827	5,146	4,207	1,465	2,729	36,063
		Jul – Sep	17,986	680	3,985	3,552	1,450	2,416	30,069
		Oct – Dec	12,166	426	3,640	2,247	873	1,550	20,902
		Jan – Mar	8,174	350	2,745	1,538	569	838	14,214
		Total	60,015	2,283	10,005	17,055	4,357	7,533	101,248

¹⁷⁹ Ibid 43.

TABLE C.1 – Home Office, 'Operation of police powers under Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches'¹⁸⁰

Police Force Area	Year of Stop and Search								Totals		Percentage Change
	2008/2009				2009/2010						
	Apr - Jun	Jul - Sep	Oct - Dec	Jan - Mar	Apr - Jun	Jul - Sep	Oct - Dec	Jan - Mar	2008/2009	2009/2010	
Cumbria	42	20	62	59	58	7	0	0	183	65	-65%
Essex	681	468	496	536	301	330	0	55	2,181	389	-82%
Greater Manchester	0	823	249	92	49	32	25	45	1,164	151	-87%
Hampshire	633	416	441	95	49	0	4	0	1,585	53	-97%
London, City of	468	607	834	676	319	426	313	328	2,585	1,386	-46%
Metropolitan	39,049	43,736	54,631	47,670	27,246	22,831	17,202	13,030	185,086	80,309	-57%
North Yorkshire	56	39	34	38	36	45	40	33	167	154	-8%
South Wales	662	539	222	271	187	0	0	0	1,694	187	-89%
Surrey	613	287	53	49	0	0	0	0	1,002	0	-100%
Sussex	184	320	429	274	423	309	303	225	1,207	1,260	4%

¹⁸⁰ Ibid.

TABLE C.2 – Home Office, 'Operation of police powers under Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches'¹⁸¹

	Year of Stop and Search										
	2008/2009				2009/2010				Totals		
Police Force Area	Apr - Jun	Jul - Sep	Oct – Dec	Jan - Mar	Apr - Jun	Jul – Sep	Oct - Dec	Jan – Mar	2008/2009	2009/2010	Percentage Change
Other forces	55	48	9	32	59	67	35	16	144	177	23%
England & Wales	42,443	47,303	57,460	49,792	28,727	23,750	17,922	13,732	196,998	84,131	-57%
British Transport Police	15,256	15,983	15,378	11,905	7,312	6,293	2,973	480	58,522	17,058	-71%
Scotland	30	56	52	22	24	26	7	2	160	59	-63%
Great Britain	57,729	63,342	72,890	61,719	36,063	30,069	20,902	14,214	255,680	101,248	-60%

¹⁸¹ Ibid.

Table D – 'How we are doing: Stop and search borough breakdown' for June 2010¹⁸²

London Borough	Total Number of S.44 stop and search	Age			Ethnicity of suspect as it appeared to the Police				Ethnicity as defined by suspect				Gender	
		Under 21	21 - 40	Over 40	White	Asian	Black	Other	White	Asian	Black	Other	Male	Female
City Airport	184	2	70	88	97	36	19	7	93	33	16	11	149	11
Greenwich	99	1	46	28	62	9	1	3	62	9	1	1	68	7
Heathrow	155	12	104	36	70	46	15	23	68	47	14	18	14	11
Tower Hamlets	436	12	182	101	213	56	7	19	181	49	2	14	261	33
Westminster	156	7	63	48	75	192	15	9	73	190	13	9	104	12

¹⁸² Metropolitan Police 'How are we doing: Stop and search borough breakdown' 2010 (January 2011)

<[http://www.met.police.uk/foi/pdfs/priorities and how we are doing/corporate/mps stop and search borough breakdown report june 2010.pdf](http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/mps_stop_and_search_borough_breakdown_report_june_2010.pdf)> accessed 9th September 2011.

Table E – 'How we are doing: Stop and search borough breakdown' for July 2010¹⁸³

London Borough	Total Number of S.44 stop and search	Age			Ethnicity of suspect as it appeared to the Police				Ethnicity as defined by suspect				Gender	
		Under 21	21 – 40	Over 40	White	Asian	Black	Other	White	Asian	Black	Other	Male	Female
City Airport	30	6	12	7	13	11	1	0	11	9	1	2	25	0
Greenwich	19	2	8	3	11	0	2	0	11	0	1	1	13	0
Heathrow	40	7	24	9	18	8	7	7	18	7	6	6	32	8
Tower Hamlets	70	0	36	18	40	16	1	0	29	10	0	4	51	6
Westminster	397	22	154	118	198	38	31	26	177	44	28	25	261	32

¹⁸³ Ibid.

As previously explained, precautionary principle and quality of intelligence may result in the use of crisis powers due to fear, rather than knowledge of an imminent threat. S44 was described, as set out at the beginning of this chapter, to prevent terrorism by deterring terrorists. The data in Tables A, B, C.1 and C.2 show that during 2009/2010 the number of s44 stop and searches fell by 60% compared to 2008/2009 figures; however no explanation is given for this, although one might argue that it is due to the *Gillan and Quinton* case as it developed through the courts. These tables also show that most stop and searches occur in the London/Metropolitan Police Area. Data released by the Metropolitan Police Service of the London Boroughs was broken down for June and July 2010 (Table D and E respectively);¹⁸⁴ it can be concluded that those most at risk of being stopped and searched under s44 were those categorised as white, male and aged 21 and over: clearly they are suspects that do not fit the perceived stereotypical profile of a terrorist as discussed earlier in this chapter.

In the Home Office's Impact Assessment¹⁸⁵ of s44 it was confirmed from the last available statistics taken between April 2009 and March 2010 in Great Britain:

- 79% of s44 was enforced by the Metropolitan Police Service;
- 59% of those stopped were white;
- 10% of those stopped were black; and
- 17% of those stopped were Asian.

Furthermore, figures released by the Home Office (2009-2010) shows that of those imprisoned for terrorist-related offences at 31st March 2010 were made up of:

- 72.2% British nationality – they would also be known as ‘home-grown terrorists’;
- 91% were of British nationality imprisoned for offences relating to domestic extremism/separatism;

Of those imprisoned for terrorist related offences:

- 86.6% declared themselves of Muslim religion;

¹⁸⁴ The London Borough's shown in Table's D and E were selected because they show the most use of Section 44, this does not mean Section 44 was not used in other London Borough's.

¹⁸⁵ Home Office (fn 118) 8.

- 45.8% of those imprisoned for domestic extremism/separatism were of no religion; and
- 0% were identified as actually being from a Muslim religion (2009-2010).

Although this information provides a mixed picture of those who are and are not terrorist suspects, it goes to strengthen the argument that the police should not stereotype or label people as ‘terrorist’ so easily. Despite such evidence, Lord Bingham in the *Gillan and Quinton* case used the ‘old woman scenario’ to explain that stop and search should not be used when a person is “obviously” not a terrorist. However, no clarification was given by His Lordship on how the police were expected to identify those who are “obviously” terrorists, particularly in circumstances when the police may have been enforcing s44 with a lack of intelligence to support any profiling. As explained earlier in this chapter, Lord Carlile QC and government Ministers believed there should be an ‘ethnic imbalance’, but the statistical data does not support this. Lord Carlile QC has since taken the view that s44 was being misused, describing them as almost certainly ‘unlawful and in no way an intelligent use of the procedure’¹⁸⁶ and would have invaded peoples human rights (Independent Terrorism Review, 2009: 140), recommending s44 should have been refused more often by the Secretary of State (Lord Carlile QC Independent Terrorism Review, 2006).

In light of his findings, and to support his conclusions, Lord Carlile QC suggested that the police should use an objective approach to assess who to stop and search (Independent Terrorism Review, 2009: 140). The failure of Lord Carlile QC to realise the importance of safeguarding against arbitrary decision making is worrying; throughout the Independent Terrorism Reviews by Lord Carlile QC it was openly commented that there was confusion why some police forces used s44, and in some cases had multiple rolling-programmes of the measure, whilst others used it less if at all. This strengthens the argument for better safeguards of clarity, transparency, accountability and independent scrutiny in the use of pre-emptive measures such as s44.

¹⁸⁶ Lord Carlile QC of Berriew (fn 88) 29: 140.

The statistics in Tables A, B, C.1, C.2, D and E (pages 83-88), the points raised earlier in this chapter and those opinions of Lord Carlile QC, may suggest that the police have enforced s44 to control the general public rather than terrorism. If the police have intelligence of a suspect their selection to stop and search becomes clear and provides grounds of suspicion. Walker's (2008) notion of 'all-risk policing' to identify terrorist suspects would require everyone to prove their innocence and might arguably enable the police to develop a test of 'trustworthiness' with the public (Yaghmanian, 2006; Amore and de Goede, 2008: 97). A test of this kind may have supported s44 because every member of the public would have been considered an equal threat. Although this would still have been no different to airport security checks, which as explained earlier, was not accepted as rationale by the ECtHR in Gillian and Quinton. A lack of safeguards, which this chapter has explored, creates a number of identifiable risks, including: the creation of sociological borders and borderlands within society that negatively impacts on specific cultures and creates suspect communities; and creates a negative public perception of the police. Awareness of these risks may prevent the overuse of s61 because greater use of intelligence would be needed and a rolling-programme of the measure would more likely be scrutinised.

Counter-terrorism 'crisis' powers creating racial and ethnic "borders" that divide communities.

When s44 was enforced by the police post-2000 the potential negative impact went beyond racial profiling; s44 was a measure used and intended to be used by the police to control the risk posed by terrorism through stop and search. Some social science scholars argue that s44 created borders and borderlands which enable control over the risk posed to national security by identifying suspects through racial and religious profiling; a vetting system is created requiring those stopped and searched to prove they are 'good, law abiding citizens' (Brunet-Jailly, 2011), although one may argue that this is similar to creating the 'trustworthiness test' discussed earlier in this chapter. If stereotypes are followed and those stopped and searched are from ethnic minorities then a control border is created around those communities which creates 'suspect communities' (Greer, 2010; Fenwick, 2010); this is not only destructive since it stigmatises cultures and communities, it tends to segregate them from the rest of society. Furthermore, if this is allowed to happen then it creates propaganda opportunities for terrorist organisations and similar extremist groups, such as Muslims Against Crusades, the British

National Party and English Defence League. The risk hidden within this is that it may support and aid radicalisation due to the negative impact such measures may have if the appropriate safeguards are not in place.

As argued within this chapter, profiling without intelligence can cause problems for the police. Racial profiling and abuse of powers to counter-terrorism can also create risks related to, if not exacerbate, poor community relations and negative perceptions of the police. Former Assistant Commissioner John Yates has stated that 'counter terrorism policing does not operate in a vacuum'¹⁸⁷ and managing the risks posed by terrorism requires strong relationships with Security Services, government and the international community. The strongest relationship to prevent terrorism however is 'rooted in the local policing';¹⁸⁸ as supported by the former British Prime Minister, Tony Blair MP.¹⁸⁹ As mentioned earlier in this chapter, frontline police provide extensive knowledge and developed relationships with their community and if this were negatively affected, the frontline police would be unable to play a key role in local policing and countering terrorism within those communities. Whilst commenting on the practices police should use, as set out by the Chief Constable of West Yorkshire Sir Norman Bettison, John Yates stated that four key objectives need to be accomplished:

- (i) better engagement with the Muslim Community;
- (ii) improve information-sharing with other authorities;
- (iii) improved support for those vulnerable to terrorist propaganda; and
- (iv) improved standard practices in understanding Prevent and Pursue and vice versa of the UK Counter-Terrorism Strategy.

No matter the strategy, it is important that the police when in the execution and enforcement of their duties under the powers given to them, do not abuse the power or trust bestowed upon them. As the most visible of the criminal justice system, they are a critical component of how they are perceived and construed by the public with the public being invited to assess the propriety (or rectitude) of their behaviour (Tyler, 2005). The perceived visibility of the police is usually based upon direct experience or observation, this would include through the use of

¹⁸⁷ Yates (fn 113).

¹⁸⁸ Ibid.

¹⁸⁹ Liaison Committee (fn 57).

crisis powers. However, the development of mass circulation of newspapers and media has enabled secondary visibility and therefore assessment of policing on a wider scale: members of the public far removed from particular situations could be made aware of policing activities and thus be able to assess their conduct (Goldsmith, 2010).¹⁹⁰ The exposure of misdeeds, misconduct or negligence can reflect badly on the police as a whole and not just the individual officer, as exemplified by the death of Ian Tomlinson and his death at the G20 summit in 2010.

Maintaining and developing strong relationships with local communities is vital, particularly in counter-terrorism policing; it can support the police in their aim to manage the risk posed by terrorism and identify terrorists; for example Isa 'Andrew' Ibrahim was arrested in 2008 following reports given to the police by the Muslim Community in Bristol of his terrorist activities. Retaining a good relationship with the local community is important to the police, particularly frontline police. It maintains a high level of public regard and trust (Police Foundation and Policy Studies Institute, 1996) and further supports the traditional idea of the police being citizens in uniform, a positive relationship with the community can mould positive public attitudes (Wirths, 1958; Correia, Reisig and Lovrich, 1996). However, history has shown that the police are not far from criticism for their practices, particularly in relation to stop and search. The Sir Macpherson Report 1999 (also known as the Stephen Lawrence Inquiry) concluded that when stopping and searching the police were 'institutionally racist' because the majority of those stopped and searched came from black or Asian backgrounds (Miller, 2010). Such conclusions are undoubtedly negative but research has shown that perceptions of the police have generally been negative (Peak, Bradshaw and Glensor, 1992; Correia, Reisig and Lovrich, 1996; Brown and Benedict, 2002; Weisburd and Eck, 2004); however, scholars have revealed that Caucasians tend to hold more positive views of the police compared to ethnic minorities (Campbell and Schman, 1972; Furstenberg and Wellford, 1973; Smith and Hawkins, 1973; Correia, Reisig and Lovrich, 1996).

Whilst considerable quantities of research that has reached this conclusion were pre-9/11, perceptions of the police post-9/11 do not improve or alter this. Arguably a reason for the

¹⁹⁰ Andrew John Goldsmith 'Policing's new visibility' 2010 British Journal of Criminology, 50(5): 914-934, 914.

police being negatively perceived may be a result of products of 'ineffective communication, cultural conflict and perceptions of discrimination' (Correia, Reisig and Lovrich, 1996: 18). However another explanation to explain poor relationships between the police and communities, particularly with younger individuals, is because the youth value their freedom whilst older generations are more security and safety orientated (Gaines, Kappeler and Vaughan, 1994). This means the police need to be seen to provide security and safety when using counter-terrorism measures, whilst simultaneously providing fairness to all and where this is not done there needs to be accountability and the option of legal remedy.

Certain negative perceptions of the police generally relate to their use of police powers such as ordinary stop and search (Correia, Reisig and Lovrich, 1996). With powers as broad as s44 that enabled arbitrary decision-making and make the police holding a quasi-judicial role, one would reasonably expect enforcement of s44 was never going to assist the police in the way they are perceived; rather the public will become more aware of the police and their conduct. As discussed earlier in this chapter, due to s44 having no test to safeguard against its enforcement (eg 'imminent threat' test), the public are more likely to scrutinise police conduct further. At the Tomlinson Inquiry evidence by Sir Paul Stephenson, the then Police Commissioner for London admitted "concern over the imagery of the actions of a small number of officers" and accepted that "the presentation of that, and the way in which that video evidence looks, does stand the potential of damaging public confidence".¹⁹¹ The image and tone set by the police through their actions when enforcing s44 or similarly broad measures need to be considered by every police officer because they each have an interest in *how* their actions are perceived by outsiders (Mawby, 2002). This further supports this thesis' argument that accountability, transparency and adequate safeguards to protect the public and the police would be of benefit.

Section 61 and segregation, radicalisation, suspect communities.

The division crisis powers, like s44, can create through the categorisation and stereotyping of communities can be counterproductive. Bowling and Phillips (2007) argued, with support of

¹⁹¹ Ibid 923.

the remarks made by Bernie Grant MP, that the relationship with the police and communities, specifically the black community, was ill-judged because of stop and search (2007: 936). This particular police power provided the most 'humiliating experience...[which became viewed as a] fact of life'.¹⁹² This demonstrates that like those subject to ordinary stop and search powers, the crisis powers of s44 would have also caused those subjected to the stop and search to become powerless and humiliated; the danger is that such powers become 'normalised' in the name of countering-terrorism, an issue that will be discussed in further detail in later chapters. As mentioned earlier in this chapter, a person who may share or understand a person's view does not necessarily make them a terrorist, yet they are made to feel as though they are. As De Mesquita and Dickson (2007) explained, when referring to Pape (2003), recognised that terrorism can be a powerful tool for generating support for a violent extremist movement (2007: 364). The underlying intention of terrorists is that they utilise violence to provoke a counter-terrorism response that is 'harsh and indiscriminate' so that they [the terrorists] can radicalise and mobilise a population of people who the terrorists claim to represent (De Mesquita and Dickson, 2007); the risk that this thesis considers is whether UK counter-terrorism measures do this. In British history an example of this can be seen by the Irish Catholics during the "Rising" in Dublin (1916) when the British responded with harsh counter-measures. English (2003) argues that the response by the British to the republican subversion "frequently involved punishing the wider population for IRA activities" which had an unintended counterproductive effect that strengthened the support given to the IRA (2003: 17). There were arguments by de Figueiredo and Weingast (2001) and Rosendoff and Sandler (2004) that suggest when government cracks down on radicalised moderates, the consequence is an increase in violence (De Mesquita and Dickson, 2007).

How the government responds and the powers they enact must be questioned in light of the wider risks that may be caused. Therefore, as the replacement for s44, the question is whether s61 prevents segregation and radicalisation? It is difficult to say given the power has not been actively used since the PoFA 2012 came into force, however one can be certain that the power itself is an improvement on s44 for reason explained in this chapter. All the same, whilst it is an improvement there is still the possibility that arbitrary decisions are made. Yet

¹⁹² Ben Bowling and Coretta Phillips 'Disproportionality and Discrimination: Reviewing the Evidence on Police Stop and Search' 2007 *Modern Law Review* 70(6): 936-961, 936.

this is slightly curtailed by the fact that the authorising officer of s61 would need to carry out a risk assessment before authorisation for which they will be accountable. Despite this there does not seem to be any clear test that frontline police should employ and it is here that arbitrary decision-making may continue to be seen. It is therefore possible that if s61 is not properly enforced then it will be just as counterproductive as s44 was.

CONCLUSION

In 1996 Lord Lloyd carried out a review of the anti-terrorism legislation¹⁹³ and described the right balance to be:

"(i) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure; (ii) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual; (iii) The need for additional safeguards should be considered alongside any additional powers; (iv) The law should comply with the UK's obligations in international law."¹⁹⁴

As discussed by Walker (2006) counter-terrorism legislation since the Diplock Report in 1972, adopted a criminal justice model, and should reject the war model adopted by the US. As discussed in this chapter, the criminal justice model is a more appropriate model to follow and Walker believes this to be the case because it is consistent with the 'rule of law and proportionate responses' (2006: 1145). Walker (2006) and Allen (1996) note that the war model approach is conducive to a lack of accountability and proportionality, as well as a threat to civil society. However, from the analysis of s44 in this chapter, it becomes clear that pre-9/11 when the TA 2000 was enacted the UK government was willing to adopt the war model and did so post-9/11. Turk (2004) believes that political pressures exist with the intention to lessen the legal restraint on the police to enable them to respond to terrorism, but in doing so ordinary legal protections are eroded and methods used by the police become more intrusive resulting in arbitrary detention (Turk, 2004: 280).

¹⁹³ Lord Lloyd of Berwick 'Inquiry into Legislation against Terrorism' 1996, Cm 3420.

¹⁹⁴ Ibid 3.1.

The *Gillan and Quinton* case supports this argument because the UK courts were willing to erode or lessen human rights to arguably support the government's aim to tackle terrorism, although it is possible that the courts were in fear of what might happen if they ruled against s44 (eg terrorist attack). However, the ECtHR rebalanced this and adopted the human rights model approach. As suggested in this chapter, the most ideal model to adopt is a criminal justice and human rights approach model and this would most likely achieve the balance Lord Lloyd suggested in 1996. Although does s61 support or adopt this approach?

Until s61 has been widely used so that statistical data can be collected and examined it remains too early to determine whether s61 adopts this model. However, when taking into account the areas of concern and the identified risks within this chapter, s61 is of little improvement from the former s44 measure. Those areas of concern and risk issues are factors that assist in addressing whether the power is a proportionate and an effective counter-terrorism measure and may also be viewed as safeguards for such counter-terrorism powers:

- (i) The need for an imminent threat test;

There needs to be a clear test that determines when such a pre-emptive measure like s44 should be used – this thesis places greater emphasis on the ‘imminent threat test’; s61 improves on this by requiring the use of the measure to be necessary. As Fenwick and Phillipson (2012) commented if there is a ‘very strong risk, or immediate threat of an attack that would cause large-scale fatalities, the ability of police officers to search on instinct would be a necessary price to pay for preventing the loss of life.’¹⁹⁵ By introducing this sort of test it means that responses are not necessarily based on fractured intelligence. It also ensures that the enforcement of such emergency powers are restricted to the areas that are at threat and a blanket ban is not imposed, which may prevent emergency powers from becoming normalised.

- (ii) Transparency in communication between the Home Secretary, authorising officer and frontline police officers;

¹⁹⁵ Fenwick and Phillipson (fn 34) 495.

There needs to be transparency from the Home Secretary to the frontline police identifying what the threat is, where the threat is expected to take place and who the threat is believed to be posed by. Doing this ensures that the police have information which they can use to formulate suspicion of individuals and reduce any possible biased, racial or religious profiling. It would also ensure that each of those key players (Home Secretary, authorising officer and frontline police) become accountable for their decisions and actions.

- (iii) The need for accountability at each stage of the process to use such powers;

There should be accountability at every level. This chapter has expressed accountability should come from those who confirm, apply and enforce such emergency. In addition this would aid in transparency and reduce any possible biased or incorrect profiling. Currently, s61 places the authorising officer as the accountable person which is an improvement on s44, supporting the need for transparency of intelligence so that they may prioritise the 'immediately applicable results rather than theoretical knowledge whose applicability is problematic' (Turk, 2004: 280). Once authorised, similar to s44, the frontline police do not have to have reasonable suspicion to stop and search or conduct their own risk assessment; instead they may continue to stop and search anyone because the authorising officer has deemed it necessary to allow the use of such powers. In this regard it is still possible that s61 would breach Articles 5 and 8 ECHR.

- (iv) Independent scrutiny by the courts and Parliament.

There should be independent scrutiny which comes from the courts and Parliament. It is important that the public has a right of remedy when police powers are used and are abused, otherwise if there is no remedy then the police can be free to use and abuse the powers given to them. The processes of risk assessment and accountability in decisions taken are maintained through independent scrutiny. A concern is that the courts, both UK and European, believe that the risk assessment by government cannot be challenged; Woolf LCJ stated at the Court of Appeal of *Gillan and Quinton*.¹⁹⁶

¹⁹⁶ R (on the application of Gillian and another) (fn 132) [76].

"the courts will not readily interfere with the judgment of the authorities as to the action that is necessary. They will usually therefore not interfere with the authorities assessment of risk and the action that should be taken to counter the risk".¹⁹⁷

With this in mind, given s61 requires an assessment of necessity it is even less likely that the UK courts will find against the police for its use, but it is more possible they will be held to account for their actions. Ultimately this chapter has examined, in detail, the impact of a controversial pre-emptive counter-terrorism measure that had been adopted by the UK government. This chapter has understood that pre-emptive action is generally based on fractured and inaccurate intelligence and as a consequence of this the state and emanation of the state behave in a precautionary manner. This approach and behaviour will impact negatively upon the UK Strategy to counter-terrorism. It must be remembered that s44, now s61, are measures that are intended to provide police presence at times of an emergency when national security is in danger; in other words the measure becomes a deterrent. Consequently, if intelligence has been used to activate the pre-emptive counter-terrorism measure, as a deterrent one may argue concern that it removes the opportunity for the government and Security Services to gather more intelligence and evidence to support the UK Strategy 2011 to detain, arrest and prosecute terrorists.

As terrorists have been viewed as opportunists, police presence will not deter a terrorist from setting off a bomb, but may for example deter two terrorists from meeting in a public place to exchange information/plots – being a deterrent they would be less likely to meet and exchange such information when there is a strong police presence. This does not mean terrorist activity reduces or stops, instead it means that terrorists have to consider alternative ways to advance their activities; therefore being aware of terrorist networks becomes more important as will be explained in Chapter Five. In addition, the safeguards identified within this chapter prevent the normalization of security measures, which should be unique and reserved for times of emergency. What s44 has shown is that the government takes traditional criminal justice norms and adapts them into pre-emptive and preventative counter-terrorism

¹⁹⁷ Conor Gearty '11 September 2001, Counter-terrorism, and the Human Rights Act' 2005b Journal of Law and Society (March) 32(1), 33.

measure, giving the impression that they should only be used for a specific purpose, although s44 was clearly overused and abused by government and police. This allows the power to become adopted as a normal power whilst simultaneously continues to support the government's argument that a state of emergency exists – more so when the courts fail to question this; this is exemplified by the rolling-programme of s44 across the whole of London. As a deterrent, pre-emptive and precautionary powers such as s44, and similar counterterrorism powers, are an early measure when little information or intelligence is available. For the reasons given, preventative measures like s44 only prevent the government from obtaining more information and intelligence. In this regard one can only conclude that s44, and similar counter-terrorism measures, are ineffective because they hinder the UK Strategy.

CHAPTER THREE

CONTROL ORDERS: DETENTION WITHOUT TRIAL UNDER COUNTER-TERRORISM POWERS; THE IMPACT ON HUMAN RIGHTS AND THE IMPORTANCE OF RISK ASSESSMENT

"Few things would provide a more gratifying victory to the terrorist than for this country to undermine its traditional freedoms in the very process of countering the enemies of those freedoms."¹⁹⁸

- Roy Jenkins MP, Former Home Secretary

INTRODUCTION

In this chapter an examination of the preventative measure of control orders and its relationship between human rights, notably Article's 5 and 6 ECHR,¹⁹⁹ and the risks the measure created. The assessment undertaken under this chapter will support and add to the concerns identified in Chapter Two when understanding that pre-emptive action can have a negative impact on detecting suspect terrorists and the states relationship with the wider community, exacerbated by a lack of safeguards in counter-terrorism measures. The findings of this chapter will achieve two things: firstly, identify issues and concerns that can be carried forward into Chapter Five when discussing the replacement preventative measure for the control orders – Terrorism Prevention and Investigation Measures (TPIMs) and Enhanced Terrorism Prevention and Investigation Measures (ETPIMs); and secondly, it will assist in addressing whether the impact of pre-emptive and preventative measures to counter-terrorism

¹⁹⁸ Statement of Roy Jenkins MP (Home Secretary) in Parliamentary Debate on 29th November 1974, cited by Clive Walker 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' 2007 Stanford Law Review 59: 1395-1463, 1403.

¹⁹⁹ Article 6 European Convention on Human Rights: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

in the UK post-9/11 support the UK Strategy, providing a balance between human rights and national security.

In 2007 the Security Services (Mi5) alleged that they had identified at least 2,000 individuals involved in terrorist-related activity in the UK, each posing a threat to national security and public safety (Anderson QC Independent Terrorism Report, 2013).²⁰⁰ Based on this, there was a clear need for appropriate and effective counter-terrorism measures that redress the threat those suspects posed. Despite this it is known that since 9/11 and up until 31st December 2011 a total of 454 suspects were charged with terrorism related activity, of which only 273 were convicted (see Table F below.

²⁰⁰ Anderson QC (fn 47) 29.

Table F – Home Office: 'Persons charged and prosecuted for terrorism-related offences' Statistical Bulletin 07/12:²⁰¹ Persons charged and prosecuted for terrorism-related offences

Number	Great Britain													
	Date of arrest						Total year ending						Change	Since 11 Sep 2001
Persons charged and outcome	Jul – Sep 2009 ²⁰²	Oct – Dec 2009	Jan – Mar 2010	Apr – Jun 2010	Jul – Sep 2010	Oct – Dec 2010	Jan – Mar 2011	Apr – Jun 2011	Jul – Sep 2011	Oct – Dec 2011	31 Dec 2010	31 Dec 2011		
Charged	3	16	4	4	1	11	6	6	16	8	20	36	16	454
Prosecuted	3	16	3	1	1	11	4	5	4	2	16	15	-1	367
Not proceeded against	-	-	-	3	-	-	1	1	-	4	3	6	3	73
Awaiting prosecution	-	-	1	-	-	-	1	-	12	2	1	15	14	18
Convicted	1	14	1	1	1	11	4	5	2	2	14	13	-1	273
Terrorism Act offences	1	5	1	-	1	9	-	2	2	-	11	4	-7	136
Other legislation (terrorism-related)	-	9	-	1	-	2	4	3	-	2	3	9	6	135
Other outcomes of prosecutions	2	2	2	-	-	-	-	-	2	-	2	2	-	95
Found not guilty	2	2	2	-	-	-	-	-	2	-	2	2	-	92
Other	-	-	-	-	-	-	-	-	-	-	-	-	-	3

²⁰¹ Home Office 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches' 2012b (14th June 2012) Home Office Statistical Bulletin HOSB 07/12 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116768/hosb0712.pdf> accessed 10th September 2013.

²⁰² Home Office 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrest, outcomes and stops and searches' 2012a (22nd March 2012) Home Office Statistical Bulletin HOSB 04/12 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116776/hosb0412.pdf> accessed 10th September 2013.

During the lifetime of the control order regime (2005-2011) a total of 52 suspects were placed under a control order (Anderson QC Independent Terrorism Report, 2012: 4), of which 24 were British citizens and 28 foreign nationals (2012: 30). Whilst the number of identified suspects does not match the number of those convicted (454/2000) or those placed under a control order (52/2000), the Security Services had identified a large number of suspects that posed a threat 'which the government accepted'.²⁰³ The government understood that it was impossible to tackle each one through the criminal justice system (Bright, 2012) and therefore alternative pre-emptive and preventative measures were utilised. The control order regime gave support to the government's preventative pillar of its CONTEST strategy, which was intended to provide control and management of the terrorist threat, essentially by 'executive-based risk management' means (Walker, 2007: 1395).²⁰⁴

The control order regime (henceforth 'the regime') was superseded by a new 'light-touch' control order regime (Fenwick, 2011:129) known as TPIMs,²⁰⁵ there is also the use of ETPIMs. The issues raised within this chapter can be applied to the examination of TPIMs and ETPIMs in Chapter 5 since they strongly resemble the former control order regime, despite the differing terminology (Fenwick, 2011). Similar to the control order regime, TPIMs are intended to prevent those suspected of being involved in terrorist-related activity by limiting their liberty; therefore similar criticisms could be levelled against TPIMs as can be against control orders. The question for Chapter Five to consider is – to what extent do the two measures differ in terms of human rights and risk?

The control order regime would manage suspected terrorists or those the Secretary of State believed to be engaged in terrorist related activity (s2(1) Prevention of Terrorism Act 2005) through the use of 'obligations', or 'substantive restrictions' (Zedner, 2007b), imposed 'for the purposes connected with protecting members of the public from a risk of terrorism'.²⁰⁶ Furthermore, it provided the government with a way of managing those suspects rather than prosecute them because of lack of evidence, as explained in the Introduction of this thesis and

²⁰³ Jonathan Bright 'Securitisation, terror, and control: towards a theory of the breaking point' 2012 Review of International Studies 38: 861-879, 870.

²⁰⁴ Walker (fn 198) 1395.

²⁰⁵ Terrorism Prevention and Investigation Measures Act 2012.

²⁰⁶ Prevention of Terrorism Act 2005, Section 1(1).

Chapter One. As the regime operated outside of the criminal justice system, it developed a reputation for being a "regime [that] acts as an impediment to prosecution",²⁰⁷ an observation made some time earlier by various academics, including Fenwick (2008).

The nature of the regime meant it would side-step and run parallel to the criminal justice system; by doing so it circumvented the guarantees ordinarily provided by a criminal trial (eg due process). Walker (2007) rightly described control orders as a provision giving 'short-term abeyances from criminal justice'²⁰⁸ and warned that they should not be used as a long-term solution (2007: 1463). Given this, the control order regime is a typical example of 'securitization' (Bright, 2012: 861). Securitization denotes the concept that certain acts are permitted despite breaking various rules; in other words, the right to a fair trial and other protections given by human rights and the criminal justice system are intentionally not adhered to; the concept was developed by Buzan, Wæver and de Wilde (1998),²⁰⁹ and supported by Bright (2012). Securitization occurs at times when an existential threat legitimises the use or need for emergency measures (eg following a terrorist attack) and is ordinarily asserted by the state or government by claiming 'a right to handle the issue through extraordinary means, to break the normal political rules of the game.'²¹⁰ Taureck (2006) suggests that securitization consists of three stages:

- (1) The identification of the existential threats;
- (2) Emergency actions; and
- (3) The effect on various relations (including societal) through the breaking of ordinary rules.

Determination of whether a securitization measure is successful is not easy. As Bright (2012) explains, knowing who the audience is becomes worthy of consideration, this would take into consideration experts, academics, legal professionals etc. Strizel (2007), Bright (2012) and Buzan and Wæver (2009) understand that at times the audience must accept the declarations or assertions made by the state. This principle would be the courts accepting the Home Secretary's assertion that a suspect is involved in terrorist related activity. The judiciary, as

²⁰⁷ MacDonald Report (fn 23) 9: 2.

²⁰⁸ Walker (fn 198) 1463.

²⁰⁹ Barry Buzan, Ole Wæver and Jaap de Wilde 'Security: A New Framework for Analysis' (London: Lynne Rienner, 1998). Also see: Bright (fn 203) 862.

²¹⁰ Ibid 24.

an audience, had the power to quash a control order or any of the imposed obligations, direct the Secretary of State to revoke the order, or amend the imposed obligations (s3 (10)-(12) PTA 2005). It will be shown within this chapter that despite having such powers, case law illustrates a trail of deference by the courts towards the government: rather than argue against the need for securitization towards a suspect or question the existence of a threat, they would simply modify control orders enabling them to continue.

Detention without trial under Part IV ATCSA 2001

This securitization measure of control orders and then TPIMS has not simply appeared, nor has it been created after much consideration and scrutiny. In fact it was created in response to the House of Lords' decision in the *Belmarsh* case,²¹¹ confirming that the former securitization measure (indefinite detention without trial) breached human rights, as will be discussed. As mentioned earlier in this thesis, the control order regime has notable similarities with previous emergency powers, particularly powers of internment used during the IRA struggles. Control Orders replaced the indefinite detention without trial measure as provided by Part IV ATCSA 2001²¹² (henceforth 'Part 4') which was introduced two months after 9/11. The Part 4 measure was itself described as being one of the most draconian measures by Lord Carlile QC (2011b).

When the 2001 Act was being passed through Parliament the then Home Secretary, David Blunkett MP, explained the powers contained in Part 4 were necessary to protect our human rights and democratic way of life by 'strengthening our democracy and reinforcing our values is as important as the passage of new laws...the legislative measures which I have outlined today will protect and enhance our rights, not diminish them...'²¹³ The ATCSA 2001 was designed to comply with the ECtHR judgment in *Chahal*,²¹⁴ under which the UK would breach Article 3 ECHR (Prohibits torture and inhuman or degrading treatment or punishment)

²¹¹ *A and Others v SSHD* (fn 24).

²¹² The Anti-Terrorism, Crime and Security Bill 2001 was presented to Parliament on the 19th November 2001 and received the Royal Assent on the 14 December 2001 becoming the Anti-Terrorism, Crime and Security Act 2001. The Control Order regime, which subsequently repealed the Part 4 scheme, was brought into force by the enactment of the Prevention of Terrorism Act 2005 which received the Royal Assent on 11th March 2005.

²¹³ House of Commons (fn 52) 925.

²¹⁴ *Chahal v United Kingdom* (1997) 23 EHRR 413 (Application No 22414/93).

if it expelled terrorist suspects to jurisdictions where torture was a considerable possibility; consequently, compliance with this ruling placed some restrictions upon what the government could do with foreign terrorist suspects in the UK. Walker (2007: 1404) explained that in 2004 the Home Office deemed it was unacceptable that total liberty is given to terrorist suspects because they cannot be convicted under the conditions of due process under the criminal justice system. It was a similar concern of Dame Eliza Manningham-Butler, Former Director-General of the Security Services:

"This is one of the central dilemmas of countering this sort of terrorism. We may be confident that an individual or group is planning an attack but that confidence comes from the sort of intelligence I described earlier, patchy and fragmentary and uncertain, to be interpreted and assessed. All too often it falls short of evidence to support criminal charges to bring an individual before the courts, the best solution if achievable."²¹⁵

The Part 4 measure became politically unpalatable (Walker, 2007); on the 18th December 2003 Lord Newton chaired a Privy Counsellors Committee²¹⁶ and published the report, pursuant to ATCSA 2001 s122, setup by the Home Secretary. The committee objected to the Part 4 measure because the system of detention lacked safeguards against injustice and the protection of British terrorists, which Walker (2007) described as 'neighbour terrorists'. The report clearly understood that the criminal justice system was made to have a secondary role in dealing with terrorist suspects, and therefore suggested an aggressive stance be taken to prosecute or greater restraints be placed upon the movement and communication of terrorist suspects.

The Belmarsh case

As previously mentioned, the Part 4 measure was successfully challenged in the House of Lords and ruled unlawful in the '*Belmarsh* case'.²¹⁷ The majority of the House of Lords

²¹⁵ Walker (fn 198) 1404 referring to Eliza Manningham-Butler, Director-General of the UK Security Services, 'The International Terrorist Threat and the Dilemmas in Countering It', Speech at the Ridderzaal Binnenhof, The Hague (1st September 2005).

²¹⁶ Privy Counsellor Review Committee 'Anti-Terrorism, Crime and Security Act 2001 Review' (12th December 2003) HC 100 <<http://www.statewatch.or/news/2003/dec/atcsReport.pdf>> accessed 25th March 2011. This is also known as the 'Newton Committee'.

²¹⁷ *A and Others v SSHD* (fn 24).

accepted that at times of a public emergency it was sufficient to warrant derogation of rights under Article 15 ECHR. The court explained that it did not have any fixed opinion with regard to the 'doctrine of deference' and should apply a 'greater intensity of review' of counter-terrorism measures taken (Lord Bingham, paragraph's 42 and 44). The court considered that the Part 4 measure was disproportionate and discriminatory on the basis that:

- (i) It was only applicable to deportable aliens; therefore it did not reflect the fact that some terrorists were British nationals (breach of Article 14 ECHR). As Baroness Hale remarked, 'if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners';²¹⁸ and
- (ii) It created a 'prison with three walls'²¹⁹ which enabled terrorist suspects to escape the UK jurisdiction and plot terrorist attacks abroad, which the court was of the opinion made no sense.

Although the House of Lords supported the declaration of a 'state of emergency', their Lordships suggested that a continued declaration would be difficult to sustain over a long period of time; however despite this point, as Chapter Two discussed the House of Lords did allow a rolling programme of s44. With regard to the 'state of emergency' Lord Bingham was of the opinion that it was a political matter, rather than a legal one.²²⁰ Lord Hoffman stated that 'freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers'.²²¹ There was concern that with the passing of time those detained had bleaker prospects of freedom and this would raise issues of a possible breach of Article 3 due to the negative impact on the detainees' mental health (Walker, 2007).

Such an argument would be supported by Bimberg Pierce Solicitors who acted on behalf of three of the detainees subject to the Part 4 detention, describing two of their clients as having "already expressed [their] nervousness at re-entering the world abruptly; each expressed

²¹⁸ Ibid [231].

²¹⁹ Ibid [81].

²²⁰ Ibid [29] (Lord Bingham): 'The more purely political a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court'.

²²¹ Ibid [87].

[their] concern that [they] would not be able to cope...”.²²² During their Lordships assessment of the detention, Lord Hoffman remarked that the "real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes, not from terrorism but laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory".²²³ This thesis argues that the counter-terrorism measures being assessed herein which have been implemented post-9/11, go against the traditional laws and political values of Britain and give terrorists a victory due to the risks the measures create. Whilst this point is supported by others such as Gearty (2005c) and was expressed by Lord Hoffman, the judiciary rarely intervene against these measures and become deferential towards them. It will be argued that this is because the judiciary 'do not swim into the deep end of policy where they are manifestly out of their depth', (Gearty, 2005c: 33) despite the recognised impact these measures can have on a person's human rights. With such a negative finding from the House of Lords, it was unsurprising that the Part 4 regime was held incompatible with the ECHR (Articles 5 and 14) and a declaration of incompatibility was made in accordance with s4 HRA 1998.²²⁴

As previously mentioned, the Part 4 regime was a form of securitization which, this thesis will argue, had a process that under the criminal justice system a breach of human rights would be caused; however under the legislative framework of Part 4, breaches of Article's 5 and 6 became possible. At the time the government did not legitimise the threat posed by the Belmarsh detainees, failing to take into consideration the terrorist threat posed by home-grown terrorists and were discriminative in dealing with the terrorist threat. The declaration of incompatibility by the House of Lords placed the UK government in a difficult situation and raised an important question: what happens next? For the government the Belmarsh detainees were identified as being a risk to national security and public safety, yet the government could not simply indefinitely detain them. The solution became two-fold: on the one-hand, the government could introduce a new regime that in practice met the aims of the

²²² Ewing and Tham (fn 59) 671.

²²³ A and Others v SSHD (fn 24) [97].

²²⁴ Human Rights Act 1998 section 4(2): 'If the court is satisfied that the provision is incompatible with a Convention rights, it may make a declaration of that incompatibility.' Section 4(4): 'If the court is satisfied – (a) that the provision is incompatible with a Convention rights; and (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.'

Part 4 regime but would be deemed ECHR compatible – this became the control order regime; on the other-hand, the government could utilise alternative processes to legitimately remove foreign national terrorists – this developed into the Deportation with Assurances ('DWA') mechanism that will be considered in Chapter Four.

THE CONTROL ORDERS REGIME

As a direct result of the *Belmarsh* case, the government withdrew its derogation of Article 5 ECHR as allowed under the Human Rights Act 1998 (Designated Derogation) Order 2001.²²⁵ This would enable to government to introduce the 'control order' regime under the PTA 2005 and by-pass the issues raised by the House of Lords in the *Belmarsh* case. As mentioned earlier in this chapter, a control order would impose obligations on the suspect to whom it applied, in this context the role of bail in the criminal justice system is similar because it is used to deter people from absconding and meet the needs of the system (Hickey, 1969-1970), specifically the 'protection of the community from a defendant during the time it takes the system to operate'.²²⁶ Zedner (2007b) has suggested that the control order regime became the model for other preventative measures within the criminal justice system, such as the Serious Crime Prevention Orders (SCPO).

Taking on board the criticisms and findings of their Lordships in the *Belmarsh* case, the government introduced two types of control orders: derogating and non-derogating. Of these two, the former was never activated whilst the latter imposed obligations which were given as an alternative to detention; the obligations were considered by the Secretary of State not to be in breach of Article 5 ECHR, pursuant to s1(3) PTA 2005. MacDonald (2007) remarked that matters of proportionality would be addressed under the regime; this is because the obligations imposed would be 'tailored to meet the threat posed by the particular suspect'.²²⁷ These obligations are considered, in comparison to the former Part 4 regime, to be less

²²⁵ Human Rights Act 1998 (Designated Derogation) Order 2001 (Statutory Instrument 2001/3644), under this Statutory Instrument the Government would be able to make such derogations on grounds of the existence of a public emergency which threatens the life of the nation.

²²⁶ J P. Hickey 'Preventive Detention and the Crime of Being Dangerous' 1969-1970 Georgetown Law Journal, 58: 287-316, 288.

²²⁷ Stuart MacDonald 'ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions' 2007 Parliamentary Affairs 60(4): 601-624, 604.

invasive of human rights (Fenwick, 2008). It is argued by Gearty (2005a) that non-derogating control orders were modelled on the Anti-Social Behaviour Order (ASBO).²²⁸ The derogating control order required the derogation from Article 5 ECHR because it required the detention of suspects without trial, this essentially allowing the government to retain the former Part 4 regime. However, as rightly noted by Zender (2007b) the PTA 2005 provided no distinguishable cut-off point between the restriction of a person's liberty and deprivation under Article 5 ECHR, nor was it clear which orders would require derogation (Fenwick, 2008: 1441). This meant that the government could impose obligations under a non-derogating control order that would arguably remove a person's liberty almost entirely as one would expect under a derogating control order. However, this would only be possible until the courts ruled that the obligations cumulatively amounted to a deprivation of liberty.

Imposing a control order and the standard of proof

It was remarked by Lord Lloyd, and mentioned by Walker (2007: 1409), that the regime involved "risk assessment" and "not a decision".²²⁹ This is a similar exercise to the one undertaken by the courts daily when assessing the risk posed by a suspect, weighing up whether to grant or refuse bail and if so what conditions to impose, a view supported by Walker (2007: 1409). However, as suggested by Walker (2007) there are those that assume they are unable to deal with matters of anticipatory risk, for example Charles Clarke MP, the then Home Secretary, remarked that the senior judiciary would 'carry out the will of Parliament, as they rightly should'.²³⁰ Lord Carlile QC reported that the basis of obtaining a control order was through intelligence, therefore making the regime 'intelligence-led':

"Much of the information is derived from intelligence. The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which there is needed a concerted and strategic response to terrorism (and especially suicide bombings). The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk – not least by any means those who offer unsolicited information out of

²²⁸ Anti-Social Behaviour Orders (ASBO's) is a measure under the Crime and Disorder Act 1998.

²²⁹ House of Lords 'Prevention of Terrorism Bill' 2004-2005 (1st March 2005) Hansard, 670(45): 115-220, 163.

²³⁰ House of Commons 'Prevention of Terrorism Bill Debate' 2004-2005c (9th March 2005) Hansard, 431(51): 1573-1658, 1576-1577.

disapproval of conduct and events at which they may have been and could continue to be present."²³¹

The former Home Secretary seems to suggest that courts should operate under the doctrine of deference when dealing with case involving alleged 'terrorists'. However, as Lord Carlile QC explains, the assessment of risk and determination of whether a control order should have been imposed comes down to the evidence, which had been obtained by intelligence. The court would simply support the government in its assertions and allegations against the controlee, causing judicial involvement to become very limited and in this way could force the doctrine of deference upon the judiciary; which is a risk that will be considered later within this chapter. The Secretary of State was able to make non-derogating orders which would then receive permission from the court without the controlee knowing it had been obtained (s3(1) PTA 2005). If the order was urgent, the Secretary of State had to apply to the court within seven days of making the control order. Yet derogating control orders could only be made by the court.

When applying for a control order there was a different standard of proof for a derogating and non-derogating control order: the latter required 'reasonable suspicion' that the suspect was involved with terrorist-related activity; compared to the former which was based on a balance of probabilities (House of Commons, 2004-2005c: column 1588). When considering that ordinary criminal proceedings have a standard of 'beyond reasonable doubt' and civil matters on the 'balance of probabilities', the lesser standard under non-derogating control orders provided the government with an 'extremely low threshold' (Joint Committee on Human Rights, 2005-2006b: paragraph 59). The use of a lesser standard is particularly worrying when the suspect has not undergone a criminal trial or civil action to support the imposition of the obligations. Whilst derogating control orders were never activated, the civil standard that is applied to it was condemned by the Joint Committee on Human Rights: '[d]eprivation of liberty on a balance of probabilities in an anathema both to the common law's traditional protection for the liberty of the individual and to the guarantees in modern human rights

²³¹ Lord Carlile QC of Berriew 'Report on the Operation in 2005 of the Terrorism Act 2000' 2006 (May) <<http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/lord-carlile-report-06?view=Binary>> accessed 7th September 2013.

instruments which reflect those ancient guarantees'.²³² The lesser standards of proof used under the control order regime was not satisfactory to the Joint Committee on Human Rights and received criticism in the House of Commons (2004-2005a) by many including David Davies MP (the former Shadow Home Secretary).²³³ It is important to note that TPIMs can only be applied under a standard of 'reasonable belief', which is a slight elevation in comparison to non-derogating control orders; whilst ETPIMs, which this thesis will suggest are more closely aligned to non-derogating control orders, retain the 'balance of probabilities' standard. These points will be revisited in Chapter Five.

The obligations imposed under a control order

As previously mentioned, the obligations imposed under a control order were intended to prevent or restrict a person's involvement with terrorist related activities; s1(4) PTA 2005 provided an illustrative list of such obligations that could have been imposed,²³⁴ however this list was not exhaustive. TPIMs and ETPIMs have continued the use of imposing obligations, unlike the control order regime TPIMs have restrictions on what obligations can be imposed, whilst ETPIMs do not; this will be discussed further in Chapter Five. Under the control order regime it was the discretion of the Home Secretary as to the nature and number of obligations that should be imposed, this power remains under TPIMs and ETPIMs. It was important those obligations imposed were proportionate in that they prevented or restricted the suspect's involvement with the terrorist activity; for example a suspect transferring money to a listed terrorist organisation might be subject to having his assets frozen. As mentioned earlier, breaching any of the obligations imposed would have resulted in a criminal offence which was punishable to imprisonment of up to five years (s9(4)(a) PTA 2005); one may argue that imposes a strict coercive characteristic upon control orders, similar to s44 as discussed in Chapter Two. As mentioned by Fenwick (2008) the level of involvement a person might have with terrorism was not necessarily taken into account, meaning disproportionate obligations may be imposed and there may even have been miscarriages of justice; this was an issue raised by the Joint Committee on Human Rights (2004-2005c).

²³² Joint Committee on Human Rights (fn 59) 20.

²³³ House of Commons 'Prevention of Terrorism Debate' 2004-2005a (22nd February 2005) Hansard, 431(40): 151-170, 156.

²³⁴ Under section 1(4) Prevention of Terrorism Act 2005 obligations available to the Home Secretary included: an 18 hour curfew; restrictions on travel, electronic tagging; restrictions on people who the controlee can associate with; communication restrictions; and their home being subject to searches by the police.

To ensure they did not breach their obligations, controlees would have to self-regulate their behaviour and actions and participate in 'self-surveillance and self-policing', adversely affecting their quality of life as well as their family and friends (Zedner, 2007b). The impact of being under the supervision of a control order was best explained by Cerie Bullivant in his interview with Liberty (2010b), giving up his ambition to study mental health nursing due to the control order imposed against him because:

"[i]t became impossible to live an ordinary life. As more and more restrictions and conditions were added, normal activities like working and studying became impossible. Not only did inflexibility of the hour that was set for the daily signing in make it difficult...but any places of work or study had to be vetted by the Home Office. What employer is going to take the risk of hiring someone on a control order! Your life is no longer your own – you can't plan anything....More and more restrictions were added to my control order; I couldn't work, I couldn't study, I couldn't plan anything, friends had turned against me, the pressure had caused my new wife to leave me. I felt isolated. I became depressed; I was having nightmares, and would wake up in the night terrified, thinking the police were at my door."²³⁵

It is explained by Zedner (2007b) that such adverse effects included the exacerbation of controlee's anxiety and stress caused by their attempts to 'self-police' their obligations; which is supported by Cerie Bullivant account (Liberty, 2010b). The regime demonstrated a level of coercion by making it a criminal offence to breach any of the imposed conditions (s9(4)(a) PTA 2005) by requiring self-surveillance to ensure compliance. This is similar to the s44 measure (see Chapter Two); the *Gillan and Quinton* case can support this argument which explained that coercion is indicative of depriving a person of their liberty under Article 5(1),²³⁶ therefore the criminal penalty caused by non-compliance to a non-criminal matter – the obligation under a control order – may be viewed as coercive, although it is unlikely to be viewed as a deprivation of liberty alone it may support any argument that it contributes to a breach of Article's 5 and 6 ECHR. Knowing this, it becomes worrying given that Lord Carlile QC in the Independent Terrorism Review (2006) stated that the nature of some

²³⁵ Liberty 'Liberty News: The Human Cost of Control Orders' 2010a (10th August) <<http://www.liberty-human-rights.org.uk/news/2010/the-human-cost-of-control-orders.php>> accessed 21st July 2012.

²³⁶ *Gillan and Quinton* (fn 15) [57].

obligations imposed would make it 'all too easy for technical breaches to occur'.²³⁷ Whilst this is still possible under both TPIMs and ETPIMs, s23 TPIMA 2011 provides a suspect a defence of reasonable excuse, although it is not specified who would assess whether an excuse is reasonable or not, it is likely to be the courts. Zedner (2007b) questioned the restrictions imposed and viewed them as being 'patchy and inconsistent'; for example, controlees who were restricted from having visitors attending their home without prior vetting and permission by the Home Office, would still be allowed to attend group prayers at a place of worship of the controlees choice. A further example concerned those placed on curfews because they may be able to move freely outside of those hours, as illustrated in the case of Mahmoud Abu Rideh who stated "I go everywhere now – on the underground, buses, the mosque. But I must be home by 7pm...the government is playing games. If I am a risk to society, why are they letting me out to be with people?"²³⁸ This raises an important question: were control orders effective in preventing or restricting a terrorist suspect from being involved in terrorist activity? One may argue in Mahmoud Abu Rideh's case that outside of his curfew he could have carried out an act of terrorism and still have been compliant with the imposed obligations. It is also worth considering whether the regime supported the UK Strategy 2011, particularly in terms of prosecution? Although this thesis will answer this in the negative, it will allow consideration of whether TPIMs and ETPIMs have improved upon this in Chapter Five.

In February 2010 when talking to Liberty, Cerie Bullivant recollected that he had technically breached his control order on a number of occasions, mainly for signing into a police station late:

"Everyday I would have to travel to a particular police station to sign in. It wasn't my local police station – it had to be 24hour station, even though I had a set one hour period to sign in. Often the police station would be busy and I would have to wait in a queue – one of my 'breaches' for being late happened as I was in the police station waiting to sign in!"²³⁹

²³⁷ Lord Carlile QC of Berriew (fn 101) 63.

²³⁸ Lucia Zedner 'Preventative justice or pre-punishment? The case of control orders' 2007b Current Legal Problems 59: 174-203, 191.

²³⁹ Liberty (fn 235).

Lord Carlile QC (2006) did originally find that the obligations imposed on controlees did not fall 'very far short of house arrest, and certainly inhibit normal life considerably'.²⁴⁰ However, as mentioned earlier, the government did not identify at which point obligations could, individually or collectively, amount to a deprivation of liberty and instead this *prima facie* seemed to be a matter for the courts. Under the enactment of PTA 2005 judicial involvement was part of the process to securing a control order. The High Court was remitted to annually review the obligations imposed under the control order to check they were appropriate/proportionate to the suspected threat posed by the controlee, pursuant to s2(4) PTA 2005. As already mentioned in this chapter and Chapter Two, there were risks of the judiciary being deferential towards government opinion; therefore would be arguable as to whether the judiciary would truly assess the proportionality of the imposed obligations. As Chapter Five will discuss, under TPIMs there has been the removal of the Home Secretary to impose forced relocation, however ETPIMs revert back to the obligations available under the control order regime – including forced relocation.

Judicial involvement in control orders

Under the PTA 2005 the control order regime provided limited judicial involvement, something that John Yates may have welcomed because it was considered that "[the] balance between the countering the threat whilst preserving the liberty of the citizen is of course for Parliament to decide and determine."²⁴¹ A lack of judicial scrutiny when a person faced deprivation of liberty was heavily criticised; Charles Clarke MP, the then Home Secretary, claimed that the lack of judicial involvement was justified:

'The Bill [which subsequently became the Act] gives certain responsibilities to the Secretary of State. I know that some honourable Members would prefer those responsibilities to be allocated entirely to the judiciary... [However], the Government's and my, prime responsibility is to protect the nation's security. In many ways, that is our paramount task. Decisions in this area are properly for the Executive, who are fully accountable to Parliament for their actions.'²⁴²

²⁴⁰ Lord Carlile QC of Berriew (fn 101) 43.

²⁴¹ Yates (fn 113).

²⁴² House of Commons (fn 233).

This was described by the Joint Committee on Human Rights (2004-2005a: 12) as 'an eccentric interpretation of the constitutional doctrine of the separation of powers', insisting that parliament and government have 'long accepted and respected the judiciary's responsibility for the liberty of the individual. To invoke national security to deny that role is to subvert our traditional constitutional division of powers' (Joint Committee on Human Rights, 2004-2005a: 11-12; MacDonald, 2007). It is important to note that the government did 'reluctantly accept' the criticisms of the Joint Committee and allowed more judicial involvement when *depriving* a person of their liberty, via a derogating control order, because it 'was such a serious matter that it could not be left in the hands of a Minister'.²⁴³ Insofar as non-derogating control orders were concerned the Minister would only be *restricting* a person's liberty,²⁴⁴ but the judicial involvement would still be 'necessary and desirable'.²⁴⁵ However, under the legislation there was a process of continual review of the imposed control order and its obligations (s8(4) PTA 2005).

The police and the Control Order Review Group (CORG) were responsible for the continual review of control orders imposed and determine whether prosecution was possible, this process of review remains under the TPIMs and ETPIMs conducted by the Terrorism Review Group'. Despite this 'review process', there were views that control orders were being used in 'preference to prosecution' (Fenwick, 2008). This form of internal review was criticised and held not to be adequate. In the case of *E*,²⁴⁶ Mr Justice Beaston observed it as 'a process which simply relied on the chief officer of the police force or the police officer present at the relevant meeting of CORG to bring matters forward is insufficient'.²⁴⁷ For the court, s3(1) PTA 2005 required the court to consider whether the decision of the Secretary of State was "obviously flawed"²⁴⁸ and whether the decision to impose specific obligations was likewise "obviously flawed".²⁴⁹ As remarked by Fenwick (2008), the court at this stage may only refuse permission if such a decision was obviously flawed, which made it unlikely that permission would be withheld. In determining whether the imposition of a control order was

²⁴³ Joint Committee on Human Rights 'Prevention of Terrorism Bill: Preliminary Report' 2004-2005a Ninth Report (25th February 2005) HC 389/HL 61, 12.

²⁴⁴ House of Commons 'Prevention of Terrorism Bill Debate' 2004-2005b (28th February 2005) Hansard 431(44): 644-788, 698-699.

²⁴⁵ House of Commons (fn 230) 1579.

²⁴⁶ *Re E* [2007] EWHC 33 (Admin).

²⁴⁷ *Ibid* [292] (Mr Justice Beaston).

²⁴⁸ Prevention of Terrorism Act 2005, Section 3(2).

²⁴⁹ *Ibid*.

obviously flawed the court would take into account the information the Secretary of State had at the time when making the decision; this was a process of assessing the Secretary of State's subjective opinion.

As seen with s44 powers, the courts are less likely to question the thinking of the person enforcing a counter-terrorism power that Parliament has enacted, which is supported by Lord Bingham's remark in the *Belmarsh* case (*Belmarsh*: 29). Whilst the judiciary do not get involved in matters outside of their depth (Gearty, 2005c: 33), their role should be limited to the assessment of the measures taken to ensure that the actions are proportionate (Gearty, 2005c) and were not excessive. To assist the court, Gearty relies upon *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*²⁵⁰ which explains that the court should ask:

"[w]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.²⁵¹

In comparison, given that control orders were a typical example of securitization, Salter (2010) suggests "we do not push the demand so high as to say that an emergency measure has to be adopted, only that the existential threat has to be argued and gain enough resonance for a platform to be made from which it is possible to legitimize emergency measures."²⁵² These may give the court support in determining whether the enforcement of a control order was legitimate or not and in evaluating the individual obligations. The difficulty with Salter's remark and the concept of securitization, as mentioned earlier in this chapter, is that by the very nature of 'securitization' the state is under no requirement to demonstrate sound reasoning. Through securitization, limitations can be imposed upon key players, like the judiciary, by invoking and declaring a state of emergency (Bright, 2012); this can be

²⁵⁰ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1991] 1 AC 69.

²⁵¹ *Ibid* [80]. Also see: Conor Gearty 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' 2005c *Current Legal Problems* 58(1): 25-46, 34.

²⁵² Buzan, Wæver and de Wilde (fn 209) 25. Also see: M B. Salter "'When Securitization Fails The Hard Case of Counter-terrorism Programmes'" in T Balzacq (ed) 'Securitization Theory: How Security Problems Evolve and Dissolve' (London: Routledge, 2010), 121.

demonstrated by the former regime by limiting judicial involvement under PTA 2005. Fenwick and Phillipson (2011) explain that the difficulty faced by the judiciary is the assessment of intelligence and risk posed by suspects typically remains as the prerogative of the executive; this can also be seen as part of the ‘state of emergency’ theory by Agamben upon which the circumstances and issues being dealt with are of such that the government are in a better position to decide the best course of action. One would argue that the best form of independent scrutiny comes from the judiciary, they should have questioned the evidence used by the government that gave foundation to the imposition of a control order. It is the view of Gearty (2005c) that the courts could have determined whether the imposition of a control order or individual obligations were proportionate or effective by applying the *de Freitas* case. Of the criteria, the third criterion is particularly important for consideration due to the arguments of deprivation of liberty caused by control orders, which will be discussed in more detail.

Although this would be an alternative way for the judiciary to be involved, under the regime they would follow a special procedure; similar to the Special Immigration Appeals Commission (SIAC), control order hearings would use of closed material and special advocates (see Fenwick, 2008: 1429-1430). Fenwick (2008) best describes the judicial supervision of these proceedings as a ‘thin veneer’. This is due to the lack of judicial involvement and its compliance with Article 6(1) ECHR; this argument was raised in *Re MB*²⁵³ where the Secretary of State applied to the court without notice (in accordance with s3(1)(a) PTA 2005) for a non-derogating order against the suspect. Subject to some minor amendments, permission was granted by Ouseley J under s3(2)(b) PTA 2005. Some of the obligations imposed included the restriction of residence and movement, subject to home searches by the police and the passport of MB being surrendered. In a subsequent hearing, Judge Sullivan held, under s3(1) PTA 2005, that s3 of the Act which related to the supervision of the court of control orders was incompatible with the suspects rights to a fair hearing as per Article 6(1) ECHR. As a consequence, the judge made a declaration of incompatibility under s4(2) HRA 1998. Despite this ruling the judge decided, under s3(13) PTA 2005, to keep the imposed control order in force.

²⁵³ Re MB [2006] EWHC 1000 (Admin).

The Secretary of State appealed this decision. At the Court of Appeal²⁵⁴ it was argued that the decision of the Home Secretary to impose a control order could be quashed, if the decision was 'obviously flawed'. At the appeal, it was accepted that the control order interfered with the civil rights of MB, therefore to comply with the Convention it had to be possible for him to challenge the control order in proceedings satisfying Article 6 ECHR. In MB's case justification for the obligations imposed was contained within closed material. Whilst MB or his special advocate did not challenge the withholding of closed material, it is important to know that MB had not been provided a summary of the closed material or the case against him.

Whilst Sullivan J confirmed he was bound by the decision of the Court of Appeal in *A v Secretary of State for the Home Department*,²⁵⁵ which held that the proceedings under s3 PTA 2005 did not amount to the determination of a criminal charge for Article 6 ECHR; although the judge did conclude that it came as close as it possibly could. Although the special advocate for MB argued the courts finding was correct, it was submitted that criminal proceedings under Article 6 ECHR had been instigated; an argument supported by JUSTICE. The control order regime not only provided a lack of judicial involvement, it gave way to the Secretary of State holding a quasi-judicial role, similar to the police with s44 powers, which raises questions of separation of powers. This was contributed to by the deferential attitude held by the judiciary to the Secretary of State. Considering the discussions in Chapter Two, the judiciary's limited role in both pre-emptive and preventative measures is caused by their own judicial willing practice or legislative framework. Unlike s44, the control order regime was subject to annual review (s1-9 PTA 2005) which enabled Parliamentary scrutiny, although these debates were poorly attended and the Secretary of State was unable to publicly discuss the reasons for imposing the control orders or obligations. In comparison, TPIMs are not subject to Parliamentary scrutiny which Walker (2013)²⁵⁶ identifies as one of the main features between the two measures which will be discussed in Chapter Five.

²⁵⁴ *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2006] 3 WLR 829.

²⁵⁵ *A v Secretary of State for the Home Department* [2004] EWCA Civ 324; [2004] QB 335.

²⁵⁶ Clive Walker 'The reshaping of control orders in the United Kingdom: Time for a fairer go, Australia!' 2013 Melbourne University Law Review, 37(1).

THE RELATIONSHIP BETWEEN CONTROL ORDERS AND HUMAN RIGHTS

Despite the lack of or restricted judicial involvement under the PTA 2005, there have been a number of significant cases²⁵⁷ that challenged the regime and questioned its compliance with human rights, specifically Articles 5 and 6 ECHR. In relation to Article 6 concerns, many of the challenges that have been seen deal directly with the processes involved namely due process and right to a fair trial. As discussed earlier in this chapter, there were concerns that the regime did not allow for the provision of sufficient information or access to evidence. Non-compliance of this would consequently prevent a suspect from explaining or defending the allegations, this altered the presumption of innocence as the suspect would be permanently labelled as a terrorist threat without having the means to prove their innocence. In addition, there were concerns regarding the legal representation of special advocates due to this unfairness. Those legal challenges that related to Article 5 ECHR considered the meaning, interpretation and application of 'deprivation of liberty' and determined whether the obligations imposed under the regime caused such a deprivation. When comparing the opinion of the Joint Committee on Human Rights, whom determined that the regime created a 'virtual house arrest', an opinion not shared by the courts who (Fenwick and Phillipson, 2011) created a narrow interpretation of the meaning 'deprivation of liberty'. The courts considered this issue in the cases of *JJ*,²⁵⁸ *E*²⁵⁹ and *MB*²⁶⁰ which were dealt with simultaneously at the House of Lords.

Control orders and the concerns of deprivation of liberty under Article 5 ECHR

In the *JJ* case²⁶¹ the controlee was subject to 18 hours house detention along with a number of other conditions.²⁶² The Secretary of State argued that due to the current climate, the concept of deprivation should be interpreted with especial narrowness when applying the

²⁵⁷ The main cases to consider include: *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2007] 3 WLR 642; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] 1 AC 499; [2007] 3 WLR 681; *Secretary of State for the Home Department v E* [2007] UKHL 47; [2007] 3 WLR 720; and *Secretary of State for the Home Department v AP* [2011] 2 AC 1; [2010] UKHRR 748; [2010] 3 WLR 51; [2010] UKSC 24.

²⁵⁸ *SSHD v JJ* (fn 55).

²⁵⁹ *Secretary of State for the Home Department v E* [2007] UKHL 47; [2007] 3 WLR 720.

²⁶⁰ *SSHD v MB and AF* (fn 54).

²⁶¹ *SSHD v JJ* (fn 55).

²⁶² *JJ*'s obligations included 18 hours house detention, visitors to be pre-checked by the Home Office, searches of his residence, confined to remain within urban areas.

criteria as set out in *Guzzardi v Italy*²⁶³ to determine deprivation of liberty has occurred. In considering whether deprivation of liberty is achieved by other forms other than incarceration. Lord Hoffman's view, which Lord Carswell shared, was that deprivation of liberty should relate to "actual imprisonment which is for practical purposes little different from imprisonment".²⁶⁴ With reference to *Engel v The Netherlands No 1*,²⁶⁵ Baroness Hale remarked that when determining whether a control order amounted to deprivation of liberty, it was important to understand that 'deprivation of liberty does not amount to a mere deprivation of the freedom to live life as one pleases, but means to be deprived of one's physical liberty'.²⁶⁶ From these opinions, the court considered the difference between deprivation of and restriction upon liberty as being 'merely one of degree or intensity and not one of nature or substance'.²⁶⁷

The majority of their Lordships identified that the most severe orders, which are those imposing an 18 hour curfew, did amount to a breach of Article 5 ECHR. Lord Bingham remarked that:

'The effect of the 18 hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little contact with the outside world, with means insufficient to permit the provision of significant facilities for self-entertainment and with the knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size...but they were.....located in an unfamiliar area where they had no family, no friends or contacts, and which was no doubt chosen for that reason.'²⁶⁸

As an 18 hour curfew under a control order was deemed a deprivation of liberty, the question remained what was an acceptable period of time? In the *E* case²⁶⁹ Lord Bingham remarked

²⁶³ *Guzzardi v Italy* (fn 137) [362]-[363]: 'In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.'

²⁶⁴ *SSH v JJ* (fn 55) [44].

²⁶⁵ *Engel v The Netherlands* (No. 1) (1976) 1 ECHR 647.

²⁶⁶ *Ibid* [58].

²⁶⁷ *SSH v JJ* (fn 55) [24].

²⁶⁸ *Ibid*.

²⁶⁹ *SSH v E* (fn 258).

that the deprivation of liberty should focus specifically upon the extent to which the suspect is actually confined; with other obligations being deemed ancillary and "[can] not of themselves effect a deprivation of liberty if the core element of confinement...is insufficiently stringent".²⁷⁰ In other words, the court considers each obligation individually rather than assessing the collective impact upon the controlee. However, compared to bail conditions wherein the court will assess the conditions, individually and collectively, to determine the impact they have on the suspect to ensure they avert the risk(s) they pose. Unlike bail, the former regime was intended to deal with risks of terrorism, as such Lord Hoffman believed there was "too great a restriction on the power of the state to deal with serious terrorist threats to the lives of its citizens",²⁷¹ supporting the governments need to protect the UK. Ultimately the House of Lords in the *E* case determined that a 12 hour curfew was acceptable, with Lord Bingham observing:

"The obligations imposed on E do, however, differ from those imposed on JJ and others in respect accepted by the courts below as material. The curfew to which he is subject is of twelve hours' duration...not eighteen hours. The residence specified in the order is his own home, where he had lived for some years, in a part of London with which he is familiar. By a variation of the order his residence is defined to include his garden, to which he thus has access at any time. He lives at home with his wife and family, and Home Office permission is not required in advance to receive visitors under the age of ten. Five members of his wider family live in the area, and have been approved as visitors. He is subjected to no geographical restrictions during non-curfew hours, is free to attend the mosque of his choice and is not prohibited from associating with named individuals."²⁷²

The comparison by Lord Bingham of the *JJ* and *E* cases demonstrated the courts application of distinguishing between deprivation and restriction of liberty, in essence it comes down to the consideration of other obligations. In the *JJ* case, Lord Brown was of the opinion that a 16 hour curfew was an acceptable obligation to impose. A minority of the House of Lords appeared to believe that national security should influence the ambit of Article 5 ECHR,

²⁷⁰ Ibid [11], confirmed in *SSSHD v AP* (fn 99) [1] (Lord Brown).

²⁷¹ *SSHD v JJ* (fn 55) [44].

²⁷² *SSHD v E* (fn 259) [7].

narrowing its application. Based on this it is unsurprising that in the *E* and *MB* cases,²⁷³ where the suspects were subjected to a 12 and 14 hour curfew with electronic tagging respectively, the House of Lords held that there had been no breach of Article 5 ECHR. In the case of *AF (No 3)*²⁷⁴ the House of Lords considered the imposed control order and the obligations of a 14 hour house detention, electronic tagging, police searches of property and premises, restriction on visitors and identified parameter. Their Lordships relied upon the *JJ* case and formed the view that the imposed house detention of 14 hours and other obligations, collectively did not amount to deprivation of liberty. The unanimous findings in *MB* and *AF* were that 14 hours house detention, along with other restrictions, does not amount to deprivation of liberty, whilst 18 hours house detention does as confirmed in *JJ*. Fenwick (2011) remarked that these findings gave the government the indication that control orders were supported by the courts so long as house detention did not go beyond 16 hours. This may be understandable given that the House of Lords did not make any form of declaration of incompatibility as it had previously with the Part 4 regime; instead it identified where there were breaches in the control order regime, following which the Secretary of State complied with.

Following on from the House of Lords findings, the issue surrounding deprivation of liberty was reignited in *Secretary of State for the Home Department v AP*.²⁷⁵ In the *AP* case it was confirmed that the determination for deprivation of liberty is achieved by assessing the physical restriction of liberty and all of the obligations imposed. *AP* was subject to a 16 hour curfew and relocation obligation to the Midlands, which was 150 miles away from his family home. At the Court of Appeal Maurice-Kay LJ confirmed that the social isolation suffered by *AP* differed from that of *JJ* who was relocated within or close to London. Despite this difference the Court of Appeal stated it believed that the isolation *AP* would feel would be due to the imposed obligations under his control order interfering with his right to a family life under Article 8 ECHR; however, this infringement could be remedied by his family visiting him occasionally.

²⁷³ *MB* had other obligations imposed which included police house search, restriction of visitors and a restriction of geographical access.

²⁷⁴ *SSHD v MB and AF* (fn 54).

²⁷⁵ *SSHD v AP* (fn 19).

The case was appealed to the UK Supreme Court where their Lordships supported the remedy identified by the Court of Appeal. Despite this the UK Supreme Court overruled the Court of Appeals decision and identified that a breach of Article 5 ECHR had occurred. The UK Supreme Court understood the 16 hour curfew imposed to be in breach of AP's Article 5 rights when taking into account the relocation obligation which collectively became destructive to AP's life that he might otherwise live (as per Lord Brown, paragraph 4). AP was obligated to be relocated away from family, which would cause internal exile, hence giving cause to argue that this sort of obligation would cause a 'deprivation of liberty' under Article 5 ECHR. Lord Brown confirmed that obligations that provide proportionate restrictions upon a person's Article 8 rights can 'tip the balance'²⁷⁶ into causing a deprivation of liberty under Article 5. Lord Brown supported the conclusions of Keith J at the High Court, finding that this aided in constituting a deprivation of liberty under Article 5. Consequently this goes back to the criteria set out in *Guzzardi v Italy*²⁷⁷ exploring the type, duration, effects and manner in which a measure is implemented to determine deprivation of liberty. Ultimately, the UK Supreme Court recognised that an Article 8 argument existed, but dealt with it as part of the argument for breaching Article 5 to determine a deprivation of liberty. Fenwick and Phillipson (2011) question whether if the imposed hours had been less or had relocation been less of an inconvenience, would the court have reached the same conclusion? An alternative question may be: had AP not been required to relocate, would there have been a breach of Article 5? The likely answer to the latter is 'no', which explains why under the new TPIMs scheme, the relocation obligation has been removed but retained under ETPIMs.

Given the history of legal challenges and the narrow interpretation used by the courts since *JJ*, it is highly possible that the court would not have reached the same decision. The behaviour of the judiciary appears to support the doctrine of deference when determining whether the imposition of the control order by the Secretary of State is correct. The process clearly circumvents the traditions of the criminal justice system and standards which can be provided for through the bail procedure. The arguments of deferential behaviour by the

²⁷⁶ Ibid [4] (Lord Brown).

²⁷⁷ *Guzzardi v Italy* (fn 137) [362]-[363]: 'In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.'

judiciary towards government decisions when dealing with matters of national security, may have been reasoned due to the nature of the issue. However, this is another way of explaining the risk of securitization as previously mentioned.

Concerns of the control order regime regarding 'due process' under Article 6 ECHR

Academics have recognised that the regime created a number of problems within the sphere of human rights, specifically in respect of due process (eg Fenwick and Phillipson, 2011). It was confirmed in *MB & AF* that control orders do not amount to a criminal charge, therefore specific rights guaranteed in terms of criminal proceedings do not apply; this is further evidence of securitization being used. It is important to remember that Article 6 ECHR provides no stated exceptions to the basic right to a fair hearing, with no specified exceptions as found under Article 5 ECHR or general public interests (Fenwick and Phillipson, 2011). In *DS v Her Majesty's Advocate*²⁷⁸ Lord Hope observed that "Article 6(1) [is] a fundamental right which [does] not admit of any balancing exercise...the public interest could never be invoked to deny that right to anybody in any circumstances".²⁷⁹ Despite this, as mentioned earlier in this chapter, the regime enabled the use of closed materials in closed hearings which restricted the representations a special advocate could make or the suspect's ability to refute the allegations. One would argue this had ramifications on the presumption of innocence that should naturally apply whether criminal proceedings are present or not.

The case against a suspect was known to be based wholly upon the closed material (also referred to as secret evidence), as explained by Sullivan J in *MB and AF*,²⁸⁰ whilst the open case before the suspect was no more than a 'bare assertion'.²⁸¹ Lord Bingham recognised that the obvious issue was that the suspect is 'confronted by a bare, unsubstantiated assertion, which he could do no more than deny'.²⁸² Naturally, the problem with terrorism cases is that the information which may justify the imposition of a control order is highly sensitive, disclosing such evidence may have further implications on covert operatives and national security. The regime got around this by creating a complex system of open and closed

²⁷⁸ *DS v Her Majesty's Advocate* [2007] UKPC D1.

²⁷⁹ *Ibid* [17].

²⁸⁰ *SSHD v MB and AF* (fn 54) [67].

²⁸¹ *Ibid*.

²⁸² *Ibid* [41].

“National Security Statements”. The closed material was not disclosed to the suspect, however the special advocate could receive and examine the closed material relied upon by the Home Secretary. Once the special advocate was given sight of this material within a closed hearing, the special advocate was prevented from further communicating with their client/the suspect (paragraph 76.25 of Sch. 1, para.7 – Civil Procedure Rules 1998).²⁸³ As a result of this restrictive process for disclosure, only the special advocates would be able to challenge the closed material with little instructions being given previously by their client.

The Joint Committee on Human Rights (2009-2010a) supported the findings of the Control Orders Renewal Report 2010, affirming that the use of secret evidence and special advocates under the regime could not operate in a way that was compatible with the "basic fairness inherent in both the common law and Article 6 ECHR".²⁸⁴ The Court of Appeal considered the procedure in the case of *MB*²⁸⁵ and concluded there was no breach to a person's right to a fair trial under Article 6(1); disagreeing with the verdict of Sullivan J.²⁸⁶ The basis of the decision, as remarked by Lord Philips CJ, was that the proceedings did not amount to the determination of a criminal charge and the ECtHR had accepted there were circumstances that required the use of or reliance upon closed material, therefore the proceedings were not incompatible with Article 6. In so far as special advocates were concerned, the court was of the opinion that the rules of the court in such proceedings 'constitute appropriate safeguards'.²⁸⁷

The Joint Committee on Human Rights (2009-2010b) accepted that the special advocates provided a safeguard by adding some protection against 'otherwise purely arbitrary decision-making'²⁸⁸ process. However, they rightly argued that they should not be used to 'reduce the standards of fairness where the common law, or statute, or human rights law, or Article 6 say that it is a minimum requirement that you must know the case against you'.²⁸⁹ A problem with the special advocates is the restrictions placed upon them to obtain instructions from

²⁸³ Civil Procedure Rules 1998 (Statutory Instrument 1998/3132).

²⁸⁴ Joint Committee on Human Rights (fn 64) 21: 54. Also see Joint Committee on Human Rights (fn 58) 47-48.

²⁸⁵ Re MB (fn 253).

²⁸⁶ Ibid.

²⁸⁷ Ibid [64].

²⁸⁸ Joint Committee on Human Rights (fn 64) 23: 61.

²⁸⁹ Ibid.

their clients, particularly when they have been given sight of the closed material; only their client may be able to explain the evidence and provide instructions that put the evidence into context. This is particularly important given that intelligence used to impose a control order may be disjointed or lack clarity, an issue discussed in Chapter Two.

Towards the end of the control order regime there was a legal challenge, *AT v Secretary of State for the Home Department*,²⁹⁰ which considered Article 6 and the a lack of sufficient knowledge and information to defend the allegations from being disclosed. 'AT' was a Libyan national and member of the Libyan Islamic Fighting Group (LIFG), an organisation that opposed Colonel Gaddafi and assisted in deposing him and his regime from power in 2011. 'AT' was granted asylum in the UK in 2003, a control order was placed upon him on 3rd April 2008 with the permission of Collins J, upheld in March 2009 and 2010 by Mitting J. The 2010 review of the control order gave rise to the Court of Appeal examining the case brought by AT. Whilst a number of grounds were argued against the imposed control order, the key consideration, as recognised by Carnwarth LJ, was the adequacy of disclosure to AT of the case against him to enable him to respond. There is a strong argument that this should breach an individual's right of knowing the case against them, a fundamental part of procedural fairness as prescribed by Articles 6 and 5(4). Here, AT was supplied with three open National Security Statements which alleged he remained "a significant and influential member",²⁹¹ of LIFG and given the opportunity would "attempt to involve himself in terrorism-related activity in the future, utilising and/or influencing the LIFG associates in the UK and overseas to help progress the pan-Islamist agenda of the LIFG".²⁹² AT argued he no longer remained a member of the group and that he retained no meaningful links with the organisation. With no information of the Security Services rationale for making such assertions, AT was unable to do much more than make the denials.

Providing such limited information to AT and considering whether it was sufficient for the requirements of fairness, as per Articles 5(4) and 6, reference was made to *A v United*

²⁹⁰ *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42.

²⁹¹ Matthew Flinn 'Another control order ruled unlawful for breach of right to fair trial' UK Human Rights Blog, One Crown Row Office (11th February 2012) <<http://ukhumanrightsblog.com/2012/02/11/another-control-order-ruled-unlawful-for-breach-of-right-to-fair-trial/>> accessed 6th May 2013.

²⁹² *Ibid.*

Kingdom.²⁹³ The fundamental nature of that ruling was described by Lord Phillips in *AF (No. 3)*²⁹⁴ at paragraph 59:

"...the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials would be."

Carnwath LJ supported the test and concluded that the allegation that AT remained a supporter of the LIFG, which was the reasoning used to justify the imposed control order, had not been made out within the open material. Therefore, such material must have been within the closed material and therefore had not been disclosed to the controlee. On this basis, AT not being given adequate disclosure and unable to respond to the allegations his control order was quashed.

It is important to understand that for a controlee, access to the information which gives the basis of the control order is important. They are not required, nor should they be expected to accept the assurances or assertions made by the state, as illustrated in *AT*.²⁹⁵ There are those within the risk society that argue that a lack of information creates suspicion (Aradau and van Munster, 2008), as described in Chapter Two this is known as 'consciousness-raising' or 'unintelligibility'. Whilst this suspicion might be of an individual it may also be of the acts or omissions of the state, for example a person subjected to a control order may become suspicious of government and judiciary when restrictions are imposed and no information as to why they are imposed is given. Whilst one may argue this can be the consequence of securitization, this also supports Gilling's (2010) suggestion that 'levels of public trust and confidence in public institutions have been declining'.²⁹⁶ Aradau and van Munster (2008) and Amore and de Goede (2008) confirm this as 'unintelligibility' and state "the absence of

²⁹³ *A v United Kingdom* (2009) 49 EHRR 29.

²⁹⁴ *AF v SSHD* (fn 20).

²⁹⁵ *AT v SSHD* (fn 290).

²⁹⁶ Daniel Gilling 'Crime Control and Due Process in Confidence-Building Strategies: A Governmentality Perspective' 2010 *British Journal of Criminology* 1136- 1154, 1137.

information becomes regarded as suspicious in itself’.²⁹⁷ This is further evidence of a re-occurring issue, similar to s44 (as discussed in Chapter Two), the burden is placed upon the controllee to prove their activities, which the state deems to be risky and abnormal, are “normal”. However, with a lack of information a controllee was less likely to be capable of achieving this.

Towards the end of the control order regime there does seem to be some judicial fight back by questioning the Secretary of State’s decision to impose a control order by assessing the evidence, both open and closed material. Knowing the case against you so that you may challenge the allegations is a natural right seen in the criminal justice system and is embedded within the bail process, which is one of the reasons why bail is compliant with human rights. If such rights are not protected then a miscarriage of justice may be the result, as suggested by Fenwick (2008). The legal challenge of *AF (No3)* was a significant development in the courts response; rather than simply accept the governments suspicion the court had taken the view that the suspect was ‘confronted by a bare, unsubstantiated assertion which he could do no more than deny’.²⁹⁸ The control order process had developed in a way that successive Home Secretaries adopted a ‘precautionary’ approach to refuse or argue against disclosure of evidence on grounds that “the slightest possibility” it may damage national security (Fenwick and Phillipson, 2011). The regime was a one-sided process that stood in favour of the government and placed suspects at a procedural disadvantage as already explained. Each legal challenge for the court progressively became a process of observing the rights of the individual with the concerns of national security. *AF (No3)* established the need to provide minimum disclosure to enable a suspect and/or their special advocate to make representations and put forward a defence. This progress is one which TPIMs will have to take note and be cautious of; otherwise, it will face similar legal challenges and most likely allow the courts to make further progress in protecting human rights.

²⁹⁷ Amoores and de Goede (fn 5) 227. Also see: Aradau and van Munster (fn 69) 23-40.

²⁹⁸ *AF v SSHD* (fn 20) [41].

Concerns about miscarriages of justice

Lack of knowledge and information through limited (if any) disclosure of evidence clearly has an impact upon an individual's ability to refute the allegations made against them.

Ultimately the courts have enabled the government to remove a controlee's right to a fair trial and access to due process by narrow interpretation of Article 6(1). If a person is unable to challenge the allegations or provide an explanation, concerns should be raised about the risk it causes, as previously mentioned; particularly in light of the issues regarding Agamben's 'state of emergency' theory and the concept of securitization. For justice, there is a concern that by being subjected to a control order the controlee and their family would become victims to a miscarriage of justice (Fenwick, 2008).

An example of such a miscarriage is demonstrated by Cerie Bullivant who wanted to study Arabic in Syria and work with orphans. At the UK airport he was stopped and detained by police, who obtained his fingerprints and questioned him for 9 hours about his family life. Under his account given to Liberty,²⁹⁹ Cerie Bullivant explained that although the police said he was 'free to go', an MI5 officer was waiting to further interview him, which included matters relating to Syria. He was then released, but his passport was retained for 3 months and this was the only time he was questioned by the authorities about terrorism. Once he had his passport returned he decided not to go to Syria, instead to go to Bangladesh because he could still learn Arabic there and help at an orphanage. Two weeks prior to travelling MI5 contacted a friend of his mother and asked whether she believed he was a terrorist and whether he should be allowed to travel; following this he was placed on a control order in 2006.

Cerie Bullivant recalls the police illegally searching his mother's address, rather than the one he was registered to live at under the control order. During the search police confirmed they 'weren't privy to the intelligence against [him] but they could assure [his mother] that it was

²⁹⁹ Liberty 'The story of Cerie Bullivant' (February, 2010b) <<http://www.liberty-human-rights.org.uk/materials/control-orders-case-study-cerie-bullivant.pdf>> accessed 29th July 2012.

irrefutable'.³⁰⁰ Cerie Bullivant described that the effect of the control order on him caused him to abscond for 5 ½ weeks, resulting in the Home Office releasing his identity and describing him as 'one of the most dangerous people in the country'.³⁰¹ He then handed himself in on a Saturday through his lawyer, who was used as an intermediary, and was advised by the police that he could turn himself in on Monday. If a person under a control order absconds, then hands themselves in and is advised to do so at a later date then the question is: how dangerous are they? For Cerie Bullivant he was dealt with as a criminal for breaching the control order, although he 'didn't feel guilty' and the court agreed.³⁰² Months later in *R (Secretary of State for the Home Department) v Cerie Bullivant*,³⁰³ Cerie Bullivant had his control order quashed in the High Court on the 22nd February 2008. Ultimately, control orders exemplify the poor relationship between human rights and securitization giving rise to the question of what risks does securitization create? This is relevant considering TPIMs and ETPIMs superseded the regime and are a similar form of securitization.

THE POTENTIAL RISKS OF CONTROL ORDERS

As explained in the Introduction and Chapter One, risk assessment enables a holistic analysis when considering whether a measure can cause a deprivation of liberty or breach a person's right to a private and family life. Here, this thesis assesses the potential risks control orders created, including: (i) the government undermining the faith and trust imposed upon them; (ii) the moral standing and perception of government being negatively perceived, as seen with the police in Chapter Two; and (iii) they create a blur between the government protecting the nation from terrorism with the government interfering in people's lives, providing examples to support terrorist propaganda. This falls in line with the consideration of whether these measures are effective and support the UK Strategy 2011 to counter-terrorism, which this thesis will answer. The consideration of the harm that control orders may cause is a vital assessment to determine whether control orders were really an effective way of managing the threat of terrorism. This will in turn assist when considering whether TPIMs and ETPIMs could be an effective measure and replacement to the control order regime. Furthermore,

³⁰⁰ Ibid 2.

³⁰¹ Ibid 3.

³⁰² Ibid.

³⁰³ *R (Secretary of State for the Home Department) v Cerie Bullivant* [2008] EWHC 337 (Admin).

discussions of risk can support an argument that human rights have been breached. The main risks to consider when looking at control orders, which have been previously mentioned in this chapter, are: firstly, the ‘collateral impact’ (Zedner, 2007b), which is the consideration of the impact of the measure upon the suspect, their family and community. The impact may include mental well-being, isolation and segregation; and secondly, the courts deferential attitude which supports Agemben’s theory of ‘homo-sacer’. The ultimate risk that may exist as a result of these is that communities become disillusioned and vulnerable to radicalisation. This was recognised by Mitting J in *CA v Secretary of State for the Home Department*:³⁰⁴

'[the risk of a permanent marriage breakdown was] as an event which, if it were to occur, would not only have an adverse impact upon her and her children, but might also increase the risk of re-engagement in terrorism-related activities by CA.'³⁰⁵

The impact of control orders on others other than the controlee

Whilst control orders were imposed to control and manage the activities of suspects, the orders themselves impacted upon others that were not subject to a control order, such as the controlees’ family. As explained earlier, Cerie Bullivant was the sole care giver to his ill mother and he attempted to conceal from her that he was subject to a control order. He was able to do so until the police unlawfully searched his mother’s residence, at which point Cerie Bullivant had to explain why the police were searching her property.³⁰⁶ A control order was believed to have a ‘negative effect’³⁰⁷ on those who were relatives and associates of the controlee, despite not being subject to the regime. The Joint Committee on Human Rights (2005-2006b) explained that this negative effect is the consequence of shame, trauma and uncertainty suffered because under a control order a ‘family is now subject equally to the restrictions placed upon the intended object of the obligation. The families believe themselves to be imprisoned in their own homes, to be stigmatised and isolated from society, to be no longer able to enjoy privacy or security within their homes without fearing at every

³⁰⁴ *CA v SSHD* (fn 57).

³⁰⁵ *CA v SSHD* (fn 57) [3].

³⁰⁶ *Liberty* (fn 299) 2.

³⁰⁷ Joint Committee on Human Rights (fn 59).

moment entry by the police or disruption from telephone calls especially throughout the night, and an atmosphere of fear and apprehension that is constant'.³⁰⁸

The link with human rights may be connected to Article 8 ECHR because one may argue that being indirectly subjected to a control order impacts upon the family's privacy. Furthermore, there may be an argument that it would breach Articles 3 and 5; in light of the Joint Committee on Human Rights findings, namely control orders may be seen as degrading treatment or depriving the family of their liberty and security in one form or another. The Joint Committee on Human Rights had raised concerns that the regime would also be an affront to the families religious and cultural sensitivities provided under Article 9 (Right to Freedom of thought, conscience and religion), particularly towards women.

The negative impact on the family of the controlee was recognised by the House of Lords in *JJ*,³⁰⁹ *MB*³¹⁰ and *E*³¹¹ stating that 'it cannot be doubted that the consequences of a control order can be... 'devastating for individuals and their families".³¹² However, despite this it was their opinion that control orders, as a preventative measure, were 'necessary'.³¹³ This finding by the House of Lords again raises concerns with the adoption of the doctrine of deference, as previously discussed. One would argue that unless the court has fully assessed the control order regime and considered alternative preventative measures, it would be inappropriate for the court to suggest the regime was necessary. In the case of *Secretary of State for the Home Department v AH*,³¹⁴ the principles from the *JJ* case were adopted by Mitting J and he found that 'social isolation is a significant factor, especially if it approaches solitary confinement during curfew periods'.³¹⁵ The difficulty for the court is the balance of precisely how long a curfew should operate and the degree of social isolation it may cause to the controlee as well as the family, particularly given the two are incommensurable.

³⁰⁸ Ibid.

³⁰⁹ *SSHD v JJ* (fn 55).

³¹⁰ *SSHD v MB and AF* (fn 54).

³¹¹ *SSHD v E* (fn 259).

³¹² *SSHD v MB and AF* (fn 54) [23]-[24].

³¹³ Ibid.

³¹⁴ *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin).

³¹⁵ Ibid [21].

In *CD v Secretary of State for the Home Department*³¹⁶ the controlee ('CD') had a control order imposed against him in February 2011, which was modified shortly afterwards requiring him to relocate from his family home in London to the Midlands. CD was allegedly a leading figure in a group of Islamist extremists in north London and had detailed knowledge and awareness of security, endeavouring to obtain firearms from those associates. It was believed that relocating him within Greater London would not be sufficient to prevent him from meeting his associates. The legal challenge by CD focused on the residency requirement, requiring the court to determine whether the modification was proportionate, as well as the obligation itself. CD argued that the relocation was "devastating" because it placed him in an area where he did not know anyone and spent considerable time apart from his family. Whilst his legal challenge was to relocate back to his family home, as an alternative it was suggested a travel subsidiary should be provided for his family and friends to visit him. CD informed the court that a close associate also suspected of being involved in terrorist related activity moved to Rochdale, placing them closer to each other than CD would be if he remained in London. Ultimately, CD argued that the residency requirement placed upon him breached his right to a private and family life (Article 8 ECHR).

Whilst it was conceded that the 'obligation to move from one's home to a relatively distant place, live for at least 12 months in a property which is not one's own and which has been chosen by someone else, is a substantial infringement of Article 8 rights'.³¹⁷ It was further argued that the conditions did not prevent his family from living with him in the Midlands. The presiding judge, Mr Justice Simon, noted that a large number of the restraints imposed upon CD 'extend[ed] far beyond any usual bail conditions...they provide a comprehensive interference with CD's rights under Article 8 (as well as 10 and 11)'.³¹⁸ There had been evidence confirming that the Secretary of State was aware that "relocating a person can have a detrimental impact on his social life."³¹⁹ Despite the concessions made by the Secretary of State and the court, it was believed that the *fear* he would engage in terrorist-related activity (*CD* case: paragraph 51) was justifiable, therefore the obligation to relocate was necessary and proportionate. Despite this the judge recognised that the interference caused was

³¹⁶ Ibid.

³¹⁷ *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin) [46].

³¹⁸ Ibid.

³¹⁹ Ibid.

‘substantial’.³²⁰ The judge appears to try and prevent the breach of Article 8 and keep the obligation of relocation proportionate by requiring the families expenditure to visit to be recoverable thereby creating an ‘appropriate way of reducing the onerous and isolating effect of the...obligation’.³²¹ This decision by the judge supports the earlier discussion about the judiciary attempting to create a balance which favours the government.

As mentioned earlier, Patrick Mercer MP described the similarity of control orders with the use of internment control orders were considered to be similar to internment that was used during the IRA conflict. The risk of isolation and segregation under internment remained just as much of a risk with control orders, both on suspects and their families. It may be suggested that the catalyst for this is dependent on the quality of the intelligence, with fragmented and unclear intelligence causing the government to adopt a precautionary approach and enforce measures which have risks such as those mentioned, including resentment towards the government, the UK and its laws (Middleton, 2011b). This would in turn be available to terrorist organisations to use as propaganda material to support their campaigns to recruit or radicalise individuals and communities (De Mesquita and Dickson, 2007). As reported by the Joint Committee on Human Rights (2009-2010b),³²² the control order regime was viewed as being counterproductive due to its impact on communities.

Concerns within risk: the doctrine of deference and ‘homo sacer’

As explained, the legal challenges against control orders have demonstrated the courts’ willingness to provide a narrow interpretation of human rights, notably the meaning of deprivation of liberty under Article 5. The deferential behaviour demonstrated by the courts, giving support to Agamben’s *homo-sacer* theory, enabled the government to place its own importance and goals above law and order, providing the executive considerable power. Whilst this may occur on the back of a catastrophic event, creating a ‘state of emergency’ enables the use of powers long after the catastrophic event itself (eg 9/11 or 7/7). One of the greatest risks that can result from this is that it creates a new ‘juridico-political paradigm’ (Amoore and de Goede, 2008: 114). This paradigm lends support to the argument of the

³²⁰ Ibid [53].

³²¹ Ibid [55].

³²² Joint Committee on Human Rights (fn 64) 23: 61.

government placing its own importance above law and order, known as ‘laws against laws’ (see Chapter One or Two for further discussion on this), eg the enactment of the PTA 2005 over the Human Rights Act 1998; some within the risk society that support this course of action such as Dershowitz (2002), Ignatieff (2004) and Posner (2004). In so far as Posner is concerned, he strongly believes in greater surveillance and imposition of restrictions on day-to-day life (Amoore and de Goede, 2008). In *CCSU v Minister for the Civil Service*³²³ the House of Lords accepted, without evidence, the government’s claim that national security was at risk. In 2000, the Court of Appeal considered the case of *Shfir ur Rehman*³²⁴ and accepted that assessing whether the threat to national security existed is a matter for the government alone. This again shows the deferential attitude taken by the judiciary towards government assertions when little evidence exists (Fenwick, 2008).

Post-9/11 the government introduced legislation that was restrictive and intrusive on human rights, making judicial involvement to question the government when using such powers ever more important. When Zedner (2007b) considered this, she formed the opinion that when the judiciary ‘interfere’ with the executives aims further restrictions may result; this perfectly demonstrated by the *Belmarsh* case which resulted in the implementation of control orders. Despite this Dershowitz remarked that there is a need for “preventative intervention” from the courts, particularly when the formal processes of criminal justice and safeguards are circumscribed, reducing the possibility of conviction (Dershowitz, 2006). Judicial intervention during the control order regime was relevant because there needed to be an understanding of what is meant by a suspect being involved in ‘terrorist related activity’; as Fenwick (2008) recognised, the meaning of this could be on a ‘very flimsy basis’ (2008: 1443). This was particularly evident under the PTA 2005 when the courts would consider whether the Secretary of State’s decision to impose the control order, as well as the obligations, was obviously flawed; more so when the quality of the intelligence may be questioned.

When a person has a lack of knowledge about the grounds and evidence to which the Secretary of State basis their decision to detain or restrict their freedom, the court should

³²³ *CCSU v Minister for the Civil Service* [1985] AC 374.

³²⁴ *SSHD v Rehman* (fn 83).

protect the suspect and their rights from arbitrary decisions and the risks they may create. The risk of unintelligibility and an inability to recover their position in society (Vlcek, 2006) after a control order was imposed, the risk those individuals and their families become outsiders became real. Cerie Bullivant described feeling isolated and suffering from depression, but came to realise that after his control order was quashed 'there was no way [his] life would return to normal...[he] still gets abused in the street, shouted and spat at. The police still stop [him]...[he's] lost friends...'.³²⁵ In the case of *AM v Secretary of State for the Home Department*,³²⁶ AM unsuccessfully challenged the control order imposed against him, arguing that whilst studying for his university degree, the obligations imposed caused him stress and frustration which resulted in anxiety. The range of legal challenges and accepted risks discussed in this thesis, appear to have failed in persuading the courts in their findings. Ewing and Tham (2008) considered whether the judiciary were responsible for their lack of upholding human rights; instead blame was directed towards the government. With the support of the 'laws against laws' theory, Ewing and Tham (2008) believe that 'weak commitment to the rule of law which the cases appear to reveal has important implications for the judicial protection of human rights, with a weak conception of the rule of law leading inexorably to low levels of protection of human rights, of which the control order decisions provide some further evidence'.³²⁷ Although the argument of laws against laws may, in part, explain why judicial involvement has become minimal under the PTA 2005, it is important to remember that the judiciary have a mandate to provide declarations of incompatibility.

The Joint Committee on Human Rights (2007-2008) was of the opinion that to be consistent with the adherence to human rights (specifically the Human Rights Act 1998), the House of Lords should be giving declarations of incompatibility. This would force Parliament to consider alternative ways of balancing "the control order legislation between the various competing interests."³²⁸ It was the conclusion of Ewing and Tham (2008) that there was a 'commitment to a weak conception of the rule of law in practice, and indeed a telling claim by Lord Brown who, in providing the synthesis between two extremes, appeared to suggest that this was barely a legal issue, but simply "a matter of opinion". A weak commitment to the rule of law was evident in the sense of (1) the approach to interpretation, (2) the

³²⁵ Liberty (fn 299) 4.

³²⁶ *AM v Secretary of State for the Home Department* [2011] EWHC 2486.

³²⁷ Ewing and Tham (fn 59) 670.

³²⁸ Joint Committee on Human Rights (fn 82) 47. Also see: Ewing and Tham (fn 59) 683.

acceptance of punishment or restraint without conviction and (3) the tolerance of various forms of arbitrary conduct by state officials at various levels.³²⁹ By not taking these points into consideration, the courts ultimately fail to protect the individual and their rights. The concern follows from the earlier discussion on human rights and its relationship with control orders as a form of securitization. The discussion on risk further shows that risk and human rights are closely interlinked, for example the *AF (No3)* case illustrates that obliging a suspect to relocate creates a new risk for consideration, specifically the impact of the obligation upon the suspect's family. One may argue that the courts have a poor record of considering the risk implications of control orders and the obligations that are imposed. Had they considered factors of risk it may have resulted in the court understanding and placing greater emphasis on the deprivation of liberty suffered as a result of the imposed counter-terrorism measure, consequently enforcing and protection human rights above the measure. Through the consideration of risk it is reasonable to suggest that securitization as a measure is intrusive and erodes human rights, particularly without independent judicial scrutiny. As mentioned earlier, TPIMs are similar to the control order regime operating in a similar manner; however, this is similarly seen by the bail process and bail conditions used within the criminal justice system. Unlike control orders, the bail process is not a securitization measure because it works within the criminal justice system, abiding by fairness and justice as set out in the Criminal Procedure Rules, legislation and human rights. Could the bail process under the Criminal Justice System be a better alternative?

BAIL AS AN ALTERNATIVE TO CONTROL AND PREVENT TERRORISM

As mentioned earlier it was a criminal offence to breach the control order and any of its imposed obligations. Given that during the history of control orders not a single controlee had a trial for terrorism offences, they had strict compliance imposed upon them through the obligations. The compliance expected under the obligations created a similarity seen under the bail process and bail conditions; suspected criminal offenders are required to comply with bail conditions in accordance with the Bail Act (BA) 1976. The process of being granted or refused bail or remanded is a process that works within criminal proceedings, making it a 'desecuritization' measure. According to McGhee (2010) it is an under-theorised process that has been described in various ways, but he views it as the adoption of a democratic

³²⁹ Ewing and Tham (fn 59) 692.

‘unexceptional’ procedure. On the other hand, its application is a response to possible ‘undemocratic’ or exceptional measures as seen by securitization and control orders (McGhee, 2010: 47). There is a presumption in favour of granting bail (s4, BA 1976). Those accused of participating in criminal activity can be granted bail by the police on condition they attend the Magistrates’ Court or in custody to appear before court within 24 hours of the arrest or as soon as practicable; this was confirmed by *R v Culley*³³⁰ and s7(4) BA 1976.

Bail conditions that can be imposed on a person include, but are not limited to, an exclusion area, reporting to a police station requirement and not to communicate with certain people by any means. It is important to note that bail conditions must be specific and justifiable in order to ensure they are effective and enforceable (Crown Prosecution Service Online Legal Guidance, 2012)³³¹ and can be onerous through the restriction of liberty, expression and privacy³³² etc. As explained at the beginning of this chapter, the process of determining proportionality of the conditions and risk of a threat to be averted, is similar for bail as it is under the control order regime, as supported by the case of *R (Crown Prosecution Service) v Chorley Justices*.³³³ Under the assessment of risk when considering whether or not to grant bail, the court will consider whether:

- (a) The individual is unlikely to surrender to custody when required to do so;
- (b) The individual has broken or is likely to break any bail conditions imposed; and
- (c) Concerns that future risks that are outlined by the CPS prosecutor may occur.

“Future risks” is a form of risk assessment conducted by the prosecutor in ordinary criminal proceedings and those assessments are communicated to the court. Under Schedule 1 of the BA 1976, the prosecutor is to have regard to future risks including the suspect’s history or offending and factors that may impact upon compliance with any conditions. In so far as alleged terrorists are concerned, the court would most likely give consideration to:

³³⁰ *R v Culley* [2007] EWHC 109.

³³¹ Crown Prosecution Service, 'Bail' <http://www.cps.gov.uk/legal/a_to_c/bail/> accessed 15th July 2012.

³³² An example of the restriction of privacy in so far as bail is concerned can be seen through the use of electronic tagging conditions, introduced by the Criminal Justice and Immigration Act 2008 sections 21-23 and Schedule 6 and 11 (which came into force 3rd November 2008).

³³³ *R (Crown Prosecution Service) v Chorley Justices* [2002] EWHC 2161 (Admin) - It was confirmed that it was proportionate and necessary to enforce curfew and residence conditions imposed on a defendant, known as ‘doorstep’ conditions, do not breach the ECHR.

- (a) The suspects history of offending; research by Hoffman (2002) has shown that those involved with terrorist activity may have been involved with other criminal acts to help fund their terrorist activities such as petty thievery;
- (b) The suspect committing offences whilst on other court orders and any previous breaches of bail, as this can illustrate the suspects failure to comply with court orders/directions;
- (c) Allegations of violence, either immediate or historically, because this may show that the suspect has a propensity to act violently and given terrorism can be an act of violence there would be concerns about releasing the suspect into the community;
- (d) The degree of temptation the suspect will have to abscond;
- (e) Factors that would impact upon the suspect being able to or prevent from compiling; and
- (f) The seriousness of the proceedings. However this is a futile point to consider because 'terrorism' is automatically considered a serious matter.

The assessment of risk in relation to control orders is not as clear as in matters relating to bail. Whilst, for reasons explained in this chapter, the government could "neither successfully prosecute nor deport"³³⁴ a suspect; the Rt. Hon. Lord Goldsmith (2007) explained that the regime was available where there was "reasonable suspicion that an individual is involved in terrorism and it is considered necessary to impose the order to protect the public from the risk of terrorism".³³⁵ In light of the similar characteristics between the two preventative processes to control and manage suspects, it is worth considering whether a counter-terrorism preventative measure, such as control orders or TPIMs, are needed if ordinary preventative measures such bail can be used and achieve the same goals.

There have been debates, particularly within the UK Parliament, as to whether those suspected of terrorism should be entitled to bail (Joint Committee on Human Rights, 2009-2010b).³³⁶ In the Operation Pathway Report, Lord Carlile QC (2009b) considered the

³³⁴ Home Office 'Review of Counter-Terrorism and Security Powers, Review Findings and Recommendations' 2011a (January) Cm 8004, 36.

³³⁵ Rt. Hon. Lord Goldsmith QC 'Keynote Address: Global Constitutionalism Symposium' 2007 Stanford Law Review (March) 59: 1155 – 1173, 1167.

³³⁶ Joint Committee on Human Rights (fn 64) 23: 61.

relevance of bail being granted by a judge with conditions for a period of 28 days after arrest to allow further enquiries to be made. However, this recommendation was rejected by the government and the then Home Secretary, Jacqui Smith MP, explaining this was due to "the risks to public safety"³³⁷ and refusal to give bail to this class of suspect is not in breach of Article 5(5). The government suggested that rejecting Lord Carlile QC's recommendation was also based on advice given by the Association of Chief Police Officers (ACPO) and the Crown Prosecution Service (CPS). Whilst the Joint Committee on Human Rights (2009-2010b) was aware that ACPO were against such provisions being made available to terrorist suspects, it was surprising to discover this advice by the CPS given it had never provided a public statement on this matter at the time. The Committee remained adamant that refusal of bail to terrorist suspects was a breach of Article 5(3) and that bail should be available for the court to grant. The concern of the Committee was that some suspects may be involved in the 'periphery of terrorist-related activity'³³⁸ rather than centrally involved, therefore the option to grant bail with conditions should be available to those suspects.

Why bail should be used to control and manage terrorist suspects.

Currently bail is unlikely to be granted to those who are suspected of terrorist-related activity due to the seriousness of the 'offence'. It is worth remembering that a person suspected of terrorist related activity may never be subject to 'criminal proceedings' and therefore bail should be granted. However, the suspicion that they are involved in terrorist activity is serious that would most likely cause the court to refuse bail and keep them in custody under the current process. Under the current standards of criminal proceedings this would arguably breach the presumption of innocence, as per Article 6, and work against the current presumption in favour of granting bail (s4 BA 1976). It is worth remembering that a person accused of committing a criminal offence should, in principle, retain their liberty until a "judicial determination of guilt".³³⁹ However, freedom would be conditioned to ensure the attendance of the accused to their trial (Hickey, 1969-1970).

³³⁷ Ibid 85.

³³⁸ Ibid 88.

³³⁹ Hickey (fn 226) 288.

As Hickey (1969-1970) best explains, bail within the criminal justice system establishes a deterrent to the accused from absconding, whilst simultaneously being used for the 'protection of the community from the defendant during the time it takes the system to operate'.³⁴⁰ In this context bail can work to intervene with suspect terrorists and their activities, which is the main objective of control orders and TPIMs. When the court is considering whether to grant or refuse bail the accused person is already a part of the criminal justice system, however as mentioned earlier, those subjected to a control order were part of a system running parallel to the criminal justice system.

When the control order regime was enacted, it was sought against the ten Belmarsh detainees who had been detained under the Part 4 regime. Eight of those had their control orders revoked, in August 2005 some were detained whilst others were given bail pending deportation or they left the country of their own accord (Fenwick, 2008). On the 12th January 2012 the ECtHR gave its judgment in *Othman (Abu Qatada) v United Kingdom*,³⁴¹ which will be considered in greater detail in Chapter Four, in which the court unanimously ruled in favour of Abu Qatada who was one of the original 8 detained without trial in Belmarsh.³⁴² The Othman ruling prevented him from being deported to his native Jordan. The decision departed from that of the House of Lords³⁴³ which had unanimously supported his deportation. Abu Qatada had been convicted twice in Jordan, in his absence, for serious terrorist related offences and he was described by SIAC as a “truly dangerous individual” for his links to terrorism and Al-Qaeda. When Mr Justice Ouseley from SIAC originally released Abu Qatada and Mahmoud Rideh on bail from Belmarsh prison, the bail conditions imposed would in time become control orders (Walker, 2007). This gives support to the argument that bail proceedings can be used as a measure to curb behaviour, protect the public and national security, in the same way control orders and TPIMs intend. A major advantage of the bail process is that the risks associated with granting bail and attaching obligations to bail, are automatically considered. This built in process of considering risk together with the

³⁴⁰ Ibid.

³⁴¹ *Othman (Abu Qatada) v United Kingdom* [2012] ECHR 56 (Application No. 8139/09).

³⁴² Abu Qatada was detained without trial under the Anti-terrorism, Crime and Security Act 2001, s23 and was one of the original applicants that challenged his incarceration in the Belmarsh case and upon being released from Belmarsh Prison he was placed upon a control order.

³⁴³ *RB (Algeria) and OO (Jordan) v SSHD* (fn 21).

transparency of the criminal justice system and protection of human rights, exemplifies a process and safeguarding that the control order regime failed to replicate.

Bail and control orders – similarity of risks

Given that bail and control orders are characteristically similar, save that the former is a type of desecuritization and the latter securitization, it follows that they are likely to be similar in terms of the risks they pose. A suspect under bail and a suspect under a control order must self-police their activities to ensure they do not breach the imposed conditions/obligations. As described earlier in this chapter, restrictions placed upon a person can affect their liberty and quality of life, placing a psychological burden upon the individual (Zedner, 2007b; 2009). However, the difference between a suspect on bail and a suspect on a control order is that: the former is monitored under the umbrella of the criminal justice system; whilst the latter was monitored by the courts annually and CORG. The psychological burden imposed by control orders was much greater due to the inability to challenge the decision (Zedner, 2007b).

A further risk showing similarity between the two is the calculation of risk posed by a person, both processes require the courts to 'connect the dots'³⁴⁴ and calculate the threat posed by the individual. This requires the understanding of the various ills and insecurities in society through the identified risks (eg threat posed against the risk to the individual and others), enabling the court to identify that the obligations/conditions imposed are proportionate to taming or eradicating the threat (Ericson and Doyle, 2004; Amoore and de Goede, 2008). It is important to note that both preventative measures, bail and control orders, assess the gravity of anticipated risk which is itself uncertain and cannot be accurate (Zedner, 2006b; 2007b). This enables the court to transparently show suspects compliance and adherence with human rights, legal standards and traditions of the processes; however in light of the legal challenges discussed in this chapter, this could only be achieved by the bail process.

³⁴⁴ Stewart Baker 'Remarks, Center for Strategic and International Studies' Washington (19th December, 2006): <http://www.dhs.gov/xnews/speeches/sp_1166557969765.shtm> accessed 21st November 2010. Also see: Amoore and de Goede (fn 5) 6.

The concerns that are attached to TPIMs, which were introduced on the 23rd May 2011 and came into effect in January 2012, are similar to the concerns and risks related to control orders. However, the discussion of bail as an alternative to controlling and managing terrorist threats whilst maintaining the human rights of the individual is important. The Joint Committee on Human Rights (2009-2010a) explained that extraordinary measures 'must not only be demonstrated to be necessary and proportionate, but should be time-limited to ensure that there is a proper opportunity to scrutinise whether the original justification still subsists'.³⁴⁵ TPIMs are intended to work more closely with the criminal justice system and support the avenue for bringing convictions; in other words, the aim of the measure is to allow surveillance of suspects to try and develop a case to prosecute. The problem TPIMs face is that they have to deal with the findings of *AP (No3)* and remove itself as a securitization measure and become more desecuritized like bail. The use of bail as an alternative to control orders or TPIMs would be a temporary measure providing safeguards against: (i) the courts becoming deferential and providing a great independent role because the criminal justice rules would apply; (ii) executive emergency powers from becoming normalised and strengthens the use of desecuritization over securitization; and (iii) establishment and development of the 'counter-terrorism model', which was discussed in Chapter One.

CONCLUSION

The introduction of the control order regime was in response to the *Belmarsh* case; however one must not forget that the atrocity of 9/11 was still fresh in people's minds. Its introduction led to the creation of a regime that had an overriding effect on established political conventions and political and legal process (Zedner, 2008). One may argue that this securitization measure was a derivative of fearing the consequences of another terrorist attack. Walker (2007) believes that the control order regime operated under an anticipatory risk method which one would suggest is similar to the precautionary principle as used with s44 as discussed in Chapter Two. The government believed that they should be 'trusted to employ wide-ranging powers responsibly'³⁴⁶ by contrasting the regime with their enactment of the HRA 1998 (MacDonald, 2007). This attempt to build up trust from the public arguably

³⁴⁵ Joint Committee on Human Rights (fn 64) 7: 8.

³⁴⁶ MacDonald (fn 227) 602.

led the way to securitization and the deferential attitude of the courts, which has created a sense of normalization towards government opinions and counter-terrorism measures.

Due to the nature of the control order regime they were viewed as a 'non-criminal control' (Gearty, 2005c: 43) and were negatively perceived to be 'internment by the back door'.³⁴⁷ Walker (2007) best described the control order regime as an operative dynamic that encompasses the imperative to 'respond to anticipatory risk' and extend action to the 'neighbour' terrorist. Whilst this again identifies the measure as a precautionary one, it brings into question whether the government actually had sufficient intelligence given that precautionary attitudes are linked with pre-emptive action, which in turn is a result of fragmented intelligence; this was likewise the findings of s44 as concluded in Chapter Two. As discussed, the regime was far removed from the practices and norms of the criminal justice system, giving support to the concept of securitization. The regime itself supports Ericson (2007) and the suggestion that pre-emptive security requires radical reconfiguration by having 'laws against laws', a theory which enables the introduction of new laws which erode and eliminate traditional principles, standards and procedures. Although this would further explain how control orders were a form of securitization, particularly when discussing judicial deference.

The discussions in this chapter regarding judiciary deference has highlighted the worrying impact securitization can have. Whilst some may believe the judiciary should be actively involved in the management of suspects whose human rights are being restricted, others such as Glees (2012)³⁴⁸ believe the courts have no role to play. The courts have become victims of securitization, one may argue, which has resulted in them taking a narrow interpretation of deprivation of liberty under Article 5. Securitization itself is imposed by government and whilst long-term suspension of the rule of law would be highly improbable, it may be possible if viewed as a temporary imposition by legitimately derogating from traditions and norms (Werner, 1998; Bright, 2012). The use of securitization and the judiciary *prima facie*

³⁴⁷ Gearty (fn 251) 44.

³⁴⁸ Anthony Glees giving evidence before the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (24th October, 2012) <<http://www.parliament.uk/documents/joint-committees/Draft%20ETPIMS%20Bill/HC%20495%20iii%2024%20October%202012%20Corrected.pdf>> accessed 19th December 2012.

being deferential to government opinion, as seen by Lord Bingham's remark that such issues are political not legal, has empowered government by continuing to trust what they say and normalise this. His Lordship seems to have omitted the importance of the judiciary to ensure that the rights of the public are protected from the interference of government.

The relationship between Article 6 and control orders had seen a shift. Article 6 provides no exceptions to the rights it provides. Firstly, there had been an erosion of the protections of a fair hearing by being brought before an 'independent and impartial tribunal'³⁴⁹ given that the judiciary have behaved deferentially in ways already discussed. Secondly, there was a reduction in the right to be brought before a 'fair and public hearing within a reasonable time'³⁵⁰ in that the regime enabled the presumption of innocence to be removed by adopting a suspicious approach. This issue had also been seen under the s44 measure, as discussed in Chapter Two, when suspects who had been stopped and searched were effectively required to prove their behaviour was normal and they were not a risk. Similarly the control order regime would require a controlee to prove the same, challenging information and intelligence that they had no access to. It should be remembered that this is a distinctive feature of pre-emptive security because it is based on precautionary logic and it normalises suspicion (Amoore and de Goede, 2008). This latter point about disclosure has been an issue of scrutiny, the government was evidently against providing information to controlees which formulated the basis for which they were suspected of being involved in terrorist-related activity; for a controlee it was naturally impossible to challenge such information. This also gives raises questions under the 'unintelligibility' issue; with a lack of information being provided to suspects the government faces questions of whether the intelligence gathered is even accurate or exists; a matter raised with s44 in Chapter Two.

Ultimately, this behaviour came to support the UK government in achieving its importance over the suspect and above legal safeguards. The matter of disclosure was improved under the *AF (No 3)* case and brought the matter more in line with Article 6(3)(a) ECHR protections: 'to be informed promptly...of the nature and cause of the accusation against him' and required the government to give the controlee a 'gist' of the case against them so they

³⁴⁹ Article 6 European Convention on Human Rights.

³⁵⁰ Ibid.

may adequately instruct their legal representatives. Difficulty arises however when special advocates are unable to converse with their client freely without the courts permission after seeing the closed material. The UK Supreme Court confirmed in the *AP* case that the courts should examine each control order and the obligations imposed as a whole when determining whether they collectively cause a deprivation of liberty. The government has sought to remove the need for this under TPIMs; obligations under a TPIM are intended to never amount to a deprivation of liberty, but would only restrict a person's liberty which was the intention of non-derogating control orders.³⁵¹

For TPIMs there needs to be consideration as to whether they improve upon the risks created by the control order regime, such as: (i) the use of obligations that negatively impact upon the suspect and their family; (ii) the executive decision making process which reduces independent scrutiny; and (iii) collectively the potential long-term impact such as radicalisation and resentment. The discussion and assessment of bail and bail conditions establishes that a more effective and proportionate way of engaging and intervening with terrorist activity can be met through desecuritization measures. Having a desecuritization measure in place, such as bail, would not criminalise activities that are remote from the commission of the actual act of terrorism, yet may work as an effective preventative measure when enforced before the anticipated threat can be realised. MacDonald (2007) recalled the Home Secretary and Prime Minister candidly say they introduced this exceptional control order regime so that they could 'not be accused of not doing more to protect the public in the event of a terrorist attack succeeding'.³⁵² He rightly argued that the greatest independent safeguard of a person's liberty is best provided by the courts, yet the legal challenges discussed in Chapter Three show securitization measures can disable the courts from doing this. A measure that aids in the detection, prosecution, imprisonment of terrorists and safety of the public, whilst guaranteeing and maintaining human rights is best viewed through the courts; Lord Phillips rightly remarked in *AF v Secretary of State for the Home Department*³⁵³ that confidence in the criminal justice system is justice that needs to be seen. Since the inception of control orders there was support by the Joint Committee on Human Rights and

³⁵¹ House of Commons (fn 244) 698-699.

³⁵² Joint Committee on Human Rights (fn 230) 16.

³⁵³ *AF v SSHD* (fn 20) [68].

Lord Carlile QC to use bail in this way, rather than use extraordinary measures like control orders.

Gearty (2005c) reports that Lord Carlile QC remarked that the obligations that could be imposed by control orders could have 'inhibit[ed] normal life considerably'.³⁵⁴ This was a massive understatement by Lord Carlile QC given that the regime created a number of long term risks, including: (i) issues relating to the mental health of the suspect placed on the control order; (ii) suspects segregation from their community, society and in some cases their family; and (iii) the victimisation or collateral impact of the family, friends and associates of the suspect. Whilst these unintended consequences or risks of the control order regime were factors which the court was not required to take into account, the courts have at times shown signs of recognising the existence of them. In *CA v Secretary of State for the Home Department*,³⁵⁵ Mitting J heard evidence from the suspect's wife and found her to be compelling when she described the impact that the relocation obligation and control order had on the family: "[the] hopelessness, anguish and extreme anxiety manifests itself in constant arguments, loneliness and in the case of our eldest child who had just turned four, Post-Traumatic Stress Disorder".³⁵⁶

Following the evidence of CA's wife, the judge held that:

'[the relocation obligation] has imposed an unendurable strain upon her and risks the permanent breakdown of the marriage – an event which, if it were to occur, would not only have an adverse impact upon her and her children, but might also increase the risk of re-engagement in terrorist-related activities by CA.'

One would argue that these effects may indirectly lend support to any terrorist propaganda campaign against the UK, as well as aid in radicalisation and recruitment of terrorists (De Mesquita and Dickson, 2007; Choudhury and Fenwick, 2011; Choudhury, 2012). Other risks

³⁵⁴ Gearty (fn 251) 44.

³⁵⁵ *CA v SSHD* (fn 57).

³⁵⁶ Statement by the wife of CA, in a full-page article in the Muslim Weekly of 16 December 2011, this wife was described by Mitting J. in a 2010 judgment as "an impressive witness and person" and accepted her evidence "without reservation" (*CA v Secretary of State for the Home Department* [2010] EWHC 2278 (QB)). Also see: Anderson QC (fn 47) 37: 3.39.

created by the control order regime relate to public confidence and trust in the courts to protect people's human rights, which may cause the criminal justice system to have a perceived lack of legitimacy. Without support and confidence of the public in the courts, there are extending concerns that the public would not comply with the law which gives rise to serious consequences for system effectiveness (Gilling, 2010). Whilst TPIMs are arguably a rebranding of the control order regime. The scheme should be capable of ensuring that procedures engage with human rights and risk assessment, facilitating the courts in its assessment of the evidence which give rise to the suspicion that a person's human rights should be interfered with; it would also ensure the courts may determine whether the interference is proportionate and effective. Anderson QC (2013) confirmed that the control order regime reduced the risk of terrorist activity; although Gomis (2013a) confirmed that there is no correlation between counter-terrorism measures and the number of terrorist activities reduced or terrorist attacks, which this thesis supports. The debate on whether the consequences of the control order regime, which this chapter has considered, were outweighed by the regimes intended benefits is difficult to determine due to evidence of this being unavailable. However, in light of the matters discussed throughout this chapter, it is appropriate to argue that the control order regime and judicial attitude towards them, were an affront to British standards and traditions. Due to this, if terrorists intended on causing governments to disproportionately react, then they have won. With suspects on a control order it becomes harder to gather any further intelligence or evidence to support subsequent prosecution; this is evidence by the fact that during the lifetime of the regime, not a single controlee underwent a trial. In this sense the control order regime fails to support the UK Strategy 2011.

Chapter Five will confirm that the new TPIMs will not remove the risks created by a pre-emptive and preventative measure as seen by control orders; although will soften some risks whilst exacerbate others, for example there will continue to be a lack of judicial involvement and independent scrutiny. This will further support the conclusion of this thesis in affirming that such measures do not support the UK Strategy to secure the prosecution of those involved in terrorist-related activity, and wrongly support a counter terrorism model which has become increasingly normalised.

CHAPTER FOUR

DEPORTATION WITH ASSURANCES OF TERRORIST SUSPECTS,
THE IMPLICATIONS OF ARTICLES 3 AND 6 EUROPEAN COURT
ON HUMAN RIGHTS & THE RISKS OF DEPORTATION

'Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention...Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.'

- *Chahal v United Kingdom*³⁵⁷

INTRODUCTION

Continuing with the assessment of the pre-emptive and preventative measures adopted by the UK government post-9/11; this chapter will use the tri-relationship model to assess the use of Deportation with Assurances (henceforth 'DWA') and its conflict with human rights, specifically Articles 3 and 6 ECHR. There has been some controversy surrounding the use of the DWA measure in circumstances where there are substantial grounds to believe that the suspect (or deportee) would face a real risk of torture, inhuman and degrading treatment, contrary to Article 3. Unlike the attitudes of the judiciary towards deprivation of liberty under the control order regime, Article 3 is an absolute right and is non-derogable (Article 15(2) ECHR; see also Turner, 2011) providing no availability for a deferential attitude. As an

³⁵⁷ *Chahal v United Kingdom* (fn 214) [79].

absolute right it "enshrines one of the most fundamental values of democratic society";³⁵⁸ this stance falls in line with the judgment by the ECtHR in *Soering*.³⁵⁹

'...It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.'³⁶⁰

It is for this reason 'greater scrutiny'³⁶¹ is needed when a state seeks to deport a person and there is a risk their Article 3 rights may be breached, a view held by Brown LJ in *R v Secretary of State for the Home Department ex parte Turgut*.³⁶² Brown LJ confirmed that anxious scrutiny will be given to Article 3 with no "special deference" being afforded to the Secretary of State because Article 3 is "...not a qualified right requiring a balance to be struck with some competing social need".³⁶³

Despite this, it will be shown that the use of 'appropriate' assurances, also known as 'Memoranda of Understanding' ('MOU') and 'diplomatic assurances' (Tooze, 2010; Lester and Beattie, 2005), between the UK and receiving countries would be sufficient; providing leeway for the government to by-pass the absolute right of Article 3, even where there was a 'real risk' of a breach occurring. By attempting this, the UK government has taken various risks which this chapter will explore by analysing assurances in a similar way to the formation of contracts, including: (i) there being no remedy for breach of assurances; (ii) the paradoxical situation created by the use of assurances and the negative reputation caused to the UK; and (iii) the absolute non-derogable protection of Article 3.

The assurances themselves are speculative assessments of the uncertain future which is difficult to assess, requiring the UK to place trust on the receiving state to abide to the assurances. This chapter will consider that one of the significant risks to the UK by using DWA is its loss of moral standing in the protection of human rights. There is also an impact

³⁵⁸ Ibid.

³⁵⁹ *Soering v United Kingdom* (1989) 11 EHRR 439.

³⁶⁰ Ibid [88].

³⁶¹ *RB (Algeria) and U (Algeria) v SSHD* (fn 21) [20].

³⁶² *R v Secretary of State for the Home Department ex parte Turgut* [2000] HRLR 337.

³⁶³ Ibid [350].

on cultural relativism because in order for the UK to deport suspects, the receiving state may be required to make constitutional changes (eg Jordan) which may affect their constitution, culture, traditions and practices. Subsequently the use of DWA may be seen as a way of passing on the ability to manage and control a threat posed by a suspect, which create long-term implications which do not support the UK Strategy 2011. The DWA measure is different to those this thesis considers in other chapters, it uses the immigration system under which deportation is possible when it is 'conducive to the public good' to do so (Immigration Act 1971 s5(1)). As asserted by Roach (2011), the DWA is an example of the 'United Kingdom revert[ing] to irrational uses of immigration law as antiterrorism law in the wake of 9/11.'³⁶⁴

Through the course of this chapter discussion will be dominated around the legal challenges made by Abu Qatada (Othman); the first legal challenge against the UK's policy of deporting suspects labelled a threat to national security (Human Rights Watch, 2007), to countries where they faced a risk of torture. In 2013 the deportation of Abu Qatada was achieved after twelve years of trying following numerous legal challenges by him. It was only achieved after Jordan (the receiving state) changed their constitution, guaranteeing the protection of his Article 3 rights. Throughout the legal challenges by Abu Qatada consideration was given to various human rights issues, more specifically the use of torture which encompasses deliberate inhuman treatment that would cause severe or cruel suffering and which can be physical or mental harm (*Ireland v United Kingdom*).³⁶⁵ Whilst any mistreatment that may be deemed to fall short of torture, there remains the level of severity which would cause a breach under Article 3 ECHR (*Tyrer v United Kingdom*;³⁶⁶ *Soering v United Kingdom*);³⁶⁷ the matter is determined on a case by case basis and depends upon all the circumstances in the case (*Soering* case, paragraph 89).

As explained in Chapter Three, the decision of the *Belmarsh* case,³⁶⁸ which held that indefinite detention without trial of foreign nationals (as per ATSCA 2001) was

³⁶⁴ Ken Roach 'The 9/11 Effect: Comparative Counter-Terrorism' (Cambridge University Press, 2011), 251.

³⁶⁵ *Ireland v United Kingdom* (fn 51).

³⁶⁶ *Tyrer v United Kingdom* (1978) 2 EHRR 1 [29] and [80].

³⁶⁷ *Soering v United Kingdom* (fn 359) [100].

³⁶⁸ *A and Others v SSHD* (fn 24).

discriminatory. This exacerbated the problem from the executive perspective as previously explained. It is understood that UK counter-terrorism strategy over the years has been influenced by a perception that the threat of terrorism emanates from foreign nationals (Elliott, 2010); see discussion on stereotyping and profiling in Chapter Two. Being unable to detain foreign terrorist suspects or put them on trial and having to adhere to the principles set out in *Chahal v United Kingdom*³⁶⁹ which prohibited deportation regardless of the risk posed by the suspect when there is a real risk of Article 3 mistreatment. Due to these hurdles the government needed to find an acceptable way of dealing with foreign terrorist suspects. Lord Goldsmith QC, former Attorney-General, stated it caused the government to face a choice of “...either leave them to roam free in the country, or detain them unless and until they left the country voluntarily.”³⁷⁰ Whilst subjecting a terrorist suspect to a control order/TPIM its enforcement would remain at the expense of the public. Alternatively, the government has sought to deport foreign terrorist suspects and this has grown in its use following the 9/11 and 7/7 terrorist attacks (Human Rights Watch, 2005; 2007).

Following the 7/7 bombings the then British Prime Minister, Tony Blair MP, publicly stated that “...the rules of the game are changing”,³⁷¹ and the use of deportation increasingly became an avenue for the government to manage and control terrorist suspects; an alternative to prosecuting them (Elliott, 2010). Many governments on the other hand transferred them and simply argued that diplomatic assurances had been given to protect suspects from torture (Human Rights Watch, 2005; 2007). The MacDonald Report (2011) supported this counter-terrorism measure and suggested that it should be expanded further:

'...the overall supervision of the courts, to which all potential deportees have access, provides clear reassurances that their rights are appropriately respected during the deportation process. The evidence turned up by the Review is strongly supportive of the government's programme of safe returns, which should be continued and, wherever possible, extended.'³⁷²

³⁶⁹ *Chahal v United Kingdom* (fn 214).

³⁷⁰ Rt. Hon. Lord Goldsmith QC (fn 335) 1166.

³⁷¹ Blair MP (fn 66). Also see A Lester and K Beattie 'Risking torture' 2005 *European Human Rights Law Review* 6: 565-571, 565.

³⁷² MacDonald Report (fn 23) 9: 7-8.

Within the UK Strategy 2011 it is recognised that action is needed against foreign terrorists based within the UK. The development of DWA can be seen as an attempt to continue to uphold ECHR standards and liberal democratic values, although paradoxically while making certain inroads into them (i.e. due to the risks posed by the use of assurances) (Elliott, 2010). This chapter continues to address the same issue the government has faced with s44 stop and search and control orders; the tension between universal and particular human (citizens' rights) rights, which Žižek (2002), supported by McGhee (2010), refer to as "the rebirth of the old distinction between human rights and the rights of citizens".³⁷³

Controversy grew with the DWA measure because of the conflict it created with Article 3, when the government knowingly deported a suspect to a country with questionable human rights records. Under these circumstances the UK government developed the practice of assurances as a way of protecting the deportee's human rights, particularly those under Article 3. In Chapters Two and Three it has been possible to consider the element of proportionality when discussing Articles 5 and 6 ECHR; however Article 3 provides no proportionate exceptions (for example see Article 8(2)).³⁷⁴ DWA is another example of securitization being used to aid the government in its aims. The DWA measure is similar to s44 and control orders; it is pre-emptive in nature because the process is implemented against a person who is a 'suspect', believed to be a 'threat to national security' without a conviction being sought by the state. Similar to the use of control orders, the suspicion leading to deportation would be based on sensitive material that would not be disclosed fully to the suspect or their legal representatives.

So far, Chapters One to Three have identified that a lack of knowledge and information means uncertainty plays a vital part in the process of consideration, known as 'unintelligibility'. Uncertainty is a significant consideration when the government is unable to

³⁷³ Slavoj Žižek 'Welcome to the Desert of the Real' (London and New York: Verso, 2002), 95. Also see: Derek McGhee 'Security, Citizenship and Human Rights: Shared Values in Uncertain Times' (Palgrave Politics of Identity & Citizenship Series: Palgrave-Macmillan, 2010), 92.

³⁷⁴ Article 8(2) European Convention of Human Rights: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

guarantee the protection of human rights once deported, questions regarding whether it is appropriate to deport should be considered. If the UK is unable to guarantee the protection of a person's Article 3 right through the assurances provided then the risk remains real, Amnesty in particular take the stance that the suspect cannot therefore be deported. Even when the assurances given are of high quality, the precautionary principle of risk, which has been discussed in Chapters Two and Three, would suggest that it remains unsafe to try and place trust in the assurances made.

DEPORTATION WITH ASSURANCES: GENERALLY

When a terrorist suspect alleges that deportation would result in a breach of their Article 3 rights it is for them to establish that there are 'substantial grounds for believing that there is a real risk of ill-treatment'³⁷⁵ in the receiving state (*R (Razgar) v Secretary of State for the Home Department*).³⁷⁶ Concerns of this kind coupled with state obligations under Article 3 were considered in the *Chahal* case. Chahal was a Sikh extremist claiming that he would be tortured if deported from the UK to India. The ECtHR held that it was a question of whether there was a substantial ground for believing that there was a 'real risk'³⁷⁷ of ill-treatment upon his return. By raising this argument the deporting state (also referred to as the 'Contracting State') was not permitted to argue the risk posed to its own citizens and national security by the suspect.

The decision of the *Chahal* case has been widely discussed by academics (Tooze, 2009; 2010; Cernic, 2008; Turner, 2011) therefore there is no need to discuss the case in detail here. However, in the *Chahal* case the court believed that the issue was not the risk posed by the potential deportee to the UK, rather the issue was whether the argument of risk to national security could be considered by the court as a ground for deportation even if the deportee would face a risk of mistreatment, breaching Article 3 upon his return. The court ruled that

³⁷⁵ *R (Razgar) v Secretary of State for the Home Department* [2003] EWCA Civ 840 [11].

³⁷⁶ *Ibid.*

³⁷⁷ *Chahal v United Kingdom* (fn 214) [74]: 'However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.'

the risk to national security could not be taken into account at all (Lord Goldsmith QC, 2007). Therefore, the use of assurances would solve the issues faced by the government in dilemmas of this nature. The MOU is a non-legally binding, bilateral political agreement enabling the government to try and proportionally balance human rights obligations with the states desire to remove a terrorist suspect. Roach (2011) refers to these agreements as "paper promises from torturers"³⁷⁸ because the assurances are being made with countries poor human rights records. By having to obtain assurances for the safe return of a suspect, it is argued that the deporting state acknowledges that the receiving state will not guarantee freedom from torture or ill-treatment (Lester and Beattie, 2005: 569). These are designed to obtain guarantees of non-torture and any other form of mistreatment that would be contrary to Article 3 (Jones, 2006; Tooze, 2010). Such assurances have been brokered with various countries, including Jordan, Libya and Lebanon (Jones, 2008; Crowther, 2010; Human Rights Watch, 2007). This may be seen as the government's attempt to curtail the interpretation and implementation of human rights in a similar way as seen with control orders, or at least dilute their obligations under human rights to support the government in its securitization endeavours (Lester and Beattie, 2005). The process of agreeing assurances between states is questionable: the contracting state has an interest in the successful deportation of the suspect, whilst the receiving state may well have an interest to have the suspect returned to them (eg Abu Qatada). There is wide condemnation by Non- Governmental Organisations (NGO's) such as Human Rights Watch and Amnesty International of this process, principally because of poor human rights records and the uncertainty of the deportee's future once deported. Due to the sensitive nature of the material and cases, the SIAC was established to deal with them; consequently SIAC became recognised as 'an expert tribunal'.³⁷⁹

Recognition as an expert tribunal has subsequently led to domestic courts, such as the House of Lords, placing a high level of reliance on the findings of SIAC, Baroness Hale remarked: "...it is probable that in understanding and applying the law in their specialised field, the tribunal will have got it right...They and they alone are judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law."³⁸⁰ The development of DWA of foreign terrorist suspects has developed through the UK's focus

³⁷⁸ Roach (fn 364) 288.

³⁷⁹ *Othman v Secretary of State for the Home Department* [2013] EWCA Civ 277.

³⁸⁰ *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 [30].

on balancing the prevention of the threat posed by terrorists with its obligations under Article 3, and more recently those under Article 6. As part of the legal process, similar to the control order regime and TPIMs, there is a use of special advocates, closed material and closed hearings; for more information about these see Chapter Three. Given these similarities, the human rights issues are the same as those identified with those counter-terrorism measures, although for DWA Lord Goldsmith QC (2007) remarked that a balance should be struck between 'the rights of the deportee and...the national security of the deporting state and the safety of its citizens'.³⁸¹ The main question, which this thesis seeks to answer, is whether this [DWA] counter-terrorism measure supports the aims of the UK Strategy 2011 to counter terrorism?

DEPORTATION WITH ASSURANCES: INTERACTION WITH HUMAN RIGHTS

The enactment of the Special Immigration Appeals Commission Act (SIACA) 1997, which established SIAC, was in response to the ECtHR decision in the *Chahal* case after it was held that the panel that originally heard Mr Chahal's case and had agreed to deport him on national security grounds, "could not be considered as a 'court' within the meaning of Article 5 para 4."³⁸² This was formed on the basis that although he was not entitled to legal representation at the hearing, the panel itself had "no power of decision and that its advice to the Home Secretary was not binding and was not disclosed."³⁸³ During the judgment of the *Chahal* case, the court identified a better system in operation in Canada where the use of special legal representatives to challenge sensitive material was used (Airkens, 2008).

By implementing the SIACA 1997 the government designed a deportation system which introduced 'special advocates' as well as 'open' and 'closed' hearings; a concept discussed in Chapter Three. As mentioned earlier, the system itself was replicated under the control order regime and now TPIMs/ETPIMs, from discussions in Chapter Three these types of 'safeguards' have received criticism. DWA has also been controversial (Crowther, 2010), particularly with the standard of proof; in *Secretary of State for the Home Department v*

³⁸¹ Rt. Hon. Lord Goldsmith QC (fn 335) 1164 and 1165.

³⁸² *Chahal v United Kingdom* (fn 214) [130].

³⁸³ *Ibid.*

Rehman,³⁸⁴ the House of Lords found that the civil standard of proof (balance of probabilities) would apply for the Home Secretary to prove the suspect is a threat to national security, compared to SIAC where the standard is 'reasonable suspicion'. Metcalfe (2009) stated on behalf of Justice,³⁸⁵ that a seized terrorist phone call recording made to a student dwelling would give rise to reasonable suspicion for action to be taken against each occupant in the property, despite the fact that only one individual might be an associate of terrorist activity. Whilst there may be a legitimate or innocent explanation, the nature of closed material is that those suspected would have no knowledge it was a particular phone call giving rise to the suspicion (Metcalfe, 2009). As Crowther (2010) explained this would leave a 'sizeable scope for injustices to occur'.³⁸⁶ Other examples of controversy come from the use of special advocates and closed hearings; however given that this has been discussed in Chapter Two there is no need to consider those points here.

The main difficulties the UK government faces come from the judgments of the *Soering* case and *Chahal* case. In the *Soering* case it was explained by the court that there should be a 'fair balance' to be struck between an individual's rights and the interests of the wider community. However, the case related to the death penalty being imposed upon the suspect when returned and not matters of terrorism. In the *Chahal* case the court was mindful of the importance of national security and the arising difficulties faced by government to counter-terrorism, remarking that 'the court is well aware of the immense difficulties faced...in modern times in protecting their communities from terrorism violence'.³⁸⁷ Despite this, as explained earlier, the court reaffirmed that '...Article 3 makes no provision for exceptions and no derogation...[not] even in the event of a public emergency threatening the life of the nation'.³⁸⁸

The then Home Secretary, Charles Clarke MP, argued that "the right to be protected from torture and ill-treatment [is] considered side by side with the right to be protected from the

³⁸⁴ R v Secretary of State for the Home Department, *ex parte* Rehman [2001] UKHL 47; [2003] 1 AC 153.

³⁸⁵ E Metcalfe 'Secret Evidence' (London: JUSTICE, 2009).

³⁸⁶ Simon Crowther 'The SIAC, Deportation and European Law' 2010 Cambridge Student Law Review 6: 227-237, 229.

³⁸⁷ *Chahal v United Kingdom* (fn 214) [79].

³⁸⁸ *Ibid.*

death and destruction caused by indiscriminate terrorism."³⁸⁹ The DWA measure has faced criticism in other areas of human rights and legal challenges, most notably those brought by Abu Qatada (*Othman v Secretary of State for the Home Department*),³⁹⁰ which expose the relationship between the risks of deporting terrorist suspects with Articles 3 and 6.

The UK's legal battle to deport Abu Qatada (known as Omar Mahmoud Othman) was a long one, with the most recent legal challenge concluding in 2013.³⁹¹ Since 2001 his case has been dealt with by three governments and numerous Home Secretaries. Abu Qatada was labelled as an 'exceptionally high risk terrorist'.³⁹² The deportation of Abu Qatada commenced because the Secretary of State deemed that doing so was to be 'conducive to the public good' as per s5(1) of the Immigration Act 1971. The basis of the threat he posed was supported by his conviction in his absence in April 1999 for terrorist offences by a Jordanian court.³⁹³ At the time Abu Qatada alleged that the evidence against him had been obtained through the torture of his co-defendant Al-Hamasher; the State Security Court and the Court of Cassation in Jordan rejected this allegation.³⁹⁴ In 2000, Abu Qatada was tried again in his absence by a Jordanian court³⁹⁵ and he again alleged that the evidence against him was obtained by torturing his co-defendant Abu Hawsher. The co-defendant was convicted and sentenced to death, whilst the Court of Cassation again dismissed the allegation made by Abu Qatada.

Whilst the UK government had labelled him a terrorist and the Jordanian authorities have convicted him of terrorist offences, others have viewed him as a leader calling upon people in

³⁸⁹ Charles Clarke MP (Home Secretary) 'Speech to the Parliamentary Assembly of the Council of Europe' (7th September 2005) <<http://www.statewatch.org/news/2005/sep/03clarke.htm>> accessed 21st November 2010. The speech was an attempt to rally support for stronger European measures to combat terrorism. See also: Redress 'Joint Committee on Human Rights – New Inquiry: Counter-terrorism policy and human rights' 14th October 2005) <http://www.redress.org/downloads/country-reports/JCHR_C-Terr_Oct2005.pdf> accessed 21st November 2010.

³⁹⁰ Mohammed Othman (Abu Qatada) v Secretary of State for the Home Department (2012), SC/15/2005, United Kingdom: Special Immigration Appeals Commission (SIAC), 21st November 2012. The appeal in this case was heard on the 11th March 2013 (*Othman v SSHD* (fn 379)).

³⁹¹ *Othman v SSHD* (fn 379).

³⁹² *Ibid* [1].

³⁹³ The case against Abu Qatada in Jordan related to a conspiracy to cause explosions, which became known as the Reform and Challenge case. This is referred to by Richards LJ, in *Othman v SSHD* (fn 379).

³⁹⁴ *Othman v SSHD* (fn 379) [8].

³⁹⁵ The case against Abu Qatada by the Jordanian government in 2000 was known as the 'Millenium Conspiracy', as referred to by Richards LJ in *Othman v SSHD* (fn 379).

the Middle East to 'rise up against the brutal dictators who made their lives a misery'.³⁹⁶ He fled Jordan in 1993 and arrived in the UK as an asylum seeker (which was granted in 1994); if returned to Jordan he would face a retrial as per Jordanian Constitution. Abu Qatada argued that if he returned to Jordan: (1) there was a real risk of him receiving ill-treatment, inhuman or degrading treatment; and (2) a real risk that evidence obtained by torture would be used against him in the re-trial. These would become the fundamental arguments against his deportation. In 2001 the Foreign and Commonwealth Office advised the UK government that there was a real risk Abu Qatada would face torture or other forms of ill-treatment, breaching Article 3, therefore preventing the government from being able to deport him. Consequently assurances were being obtained by the government to prevent such risks from materialising. By 2005 assurances obtained between the two countries provided compliance with Article 3 and 6 rights.

Article 3 and the absolute prohibition of torture or inhuman or degrading treatment

As explained earlier in this chapter, the very nature of Article 3 is such that even during times of war and public emergency individuals are still entitled to enjoy the protections this right offers; this is distinctively different from the Convention rights discussed in Chapter Two and Three, which provide availability for interpretation and proportionality. The difficulty for the UK government has been the growth of suicide violence post-9/11 (Turner, 2011). In the case of *Limbuela v Secretary of State for the Home Department*³⁹⁷ Laws LJ explained that it would be wrong to allow considerations of proportionality when the conduct of the state is directly responsible for the treatment that a person suffers. As mentioned earlier in this chapter, unlike control orders and TPIMs, DWA does not have the ability to derogate responsibilities under the ECHR as confirmed by Article 15(2) and the ECtHR in *Aksoy v Turkey*.³⁹⁸

'Article 3...enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention...Article 3 makes no

³⁹⁶ PressTVGlobalNews <<http://www.youtube.com/watch?v=g6Kw7SPYsxU&feature=fvwp&NR=1>> accessed 29th June 2013.

³⁹⁷ *Limbuela v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

³⁹⁸ *Aksoy v Turkey* (1996) 23 EHRR 553.

provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.'³⁹⁹

In the *RB (Algeria)* case the *Chahal* case was interpreted with emphasis being placed upon the deporting state for the 'safeguarding' against treatment that would contravene Article 3:

'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion'.⁴⁰⁰

Taking into account the *Limbuela* case and the *RB (Algeria)* case, the deporting state would be considered responsible for any mistreatment the deportee would suffer because had the suspect not been deported they would not have suffered such mistreatment. The post-9/11 case of *Saadi v Italy*⁴⁰¹ reaffirmed that assurances can provide a degree of protection, although they do not necessarily constitute a sufficient safeguard as the ECtHR found 'the weight to be given to assurances from the receiving state depends in each case, on the circumstances prevailing at the material time'.⁴⁰² The *Saadi* case considered reports from Amnesty International, Human Rights Watch and other organisations which suggested that Tunisia (the receiving state in the *Saadi* case) was engaged in torture and inhuman and degrading treatment against prisoners; this was despite the fact Tunisia was a party to international legislation. Whilst the *Saadi* case reaffirmed the degree of importance assurances can have, non-governmental organisations (NGOs) have identified occasions when the government has presented evidence of safe return when in fact they were 'pandering to the sensitivities'⁴⁰³ of the receiving state (Justice Report, 2009: 118-33).⁴⁰⁴ This demonstrates the importance of the terms within the assurances and verification of

³⁹⁹ Ibid [62].

⁴⁰⁰ *RB (Algeria) and OO (Jordan) v SSHD* (fn 21) [22].

⁴⁰¹ *Saadi v Italy* (2009) 49 E.H.R.R. 30. (Application No 37201/06).

⁴⁰² Ibid [148].

⁴⁰³ Helen Fenwick and Gavin Phillipson 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' 2011 McGill Law Journal 56(4): 863-918, 912.

⁴⁰⁴ Justice 'Secret Evidence: A JUSTICE Report' (Justice, 2009).

compliance post-deportation, otherwise the UK would be unable to effectively alleviate any real risk of Article 3 breaches.

The prohibition of torture and ill-treatment is such that states are expected to actively prevent such treatment from occurring. Where allegations have been made extensive scrutiny and investigation should follow before deportation. This active prevention of such treatment has been confirmed by the ECtHR in *Assenov v Bulgaria*;⁴⁰⁵ in which the court considered the applicant's complaint about his alleged ill-treatment at the hands of the Bulgarian police, saying:

'The Court considers that...where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3 that provision...requires by implication that there should be an effective official investigation. This obligation...should be capable of leading to the identification and punishment of those responsible. If this was not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.'⁴⁰⁶

This provides a clear understanding of the obligation on the state to protect and prevent harm coming to deportees. When applying this to the deportation of terrorist suspects it is understandable why it becomes complicated for the UK government to do so. The long history of legal challenges since the *Belmarsh* case, and those between the UK and Abu Qatada, demonstrate the complexity of trying to protect national security and the deportees Article 3 rights. Under assurances given by the Jordanian authorities in *Othman v Secretary of State for the Home Department*⁴⁰⁷ and *VV v Secretary of State for the Home*

⁴⁰⁵ *Assenovo v Bulgaria* (90/1997/874/1086) (28th October 1998).

⁴⁰⁶ *Ibid* [102].

⁴⁰⁷ *Abu Qatada v Secretary of State for the Home Department* (2007), SC/15/2005, United Kingdom: Special Immigration Appeals Commission (SIAC), 26th February 2007.

Department,⁴⁰⁸ SIAC concluded that assurances removed the real risk of Othman's Article 3 rights from being breached. SIAC found that the assurances could be relied upon because of:

'[i] the close and friendly relations which have existed at all levels in the governments of both countries for many decades; and [ii] the general coincidence of interests of the two countries in those aspects of international affairs which affect them both.'⁴⁰⁹

This would suggest that in determining whether an assurance can be relied upon, the court initially considered the relationship between the two states as part of the process to protecting the Article 3 rights of the deportee and supporting deportation.

(i) *Othman v United Kingdom: Article 3 ECHR*

In *MT (Algeria) and Others v Secretary of State for the Home Department*,⁴¹⁰ SIAC gave strong views in respect of Abu Qatada:

'[h]is deportation is necessary in the interest of national security, by which we mean that it is necessary as a measure of defence for the rights of those who live here.'

In February 2009 the House of Lords⁴¹¹ heard the appeal of Abu Qatada against the SIAC⁴¹² decision that he could be safely deported to Jordan due to the assurances given. This was primarily based upon the high profile of Abu Qatada, coupled with the assurances:

'So far as Article 3 was concerned, in the absence of special circumstances there would have been a risk that Mr Othman's deportation would infringe his rights under Article 3. There would have been a real risk that he would be ill-treated in custody. As it was, the fact that he would have a very high profile coupled with the MoU, and the diplomatic capital invested in

⁴⁰⁸ *VV v Secretary of State for the Home Department* (2007), SC/59/2006, United Kingdom: Special Immigration Appeals Commission (SIAC), 2nd November 2007.

⁴⁰⁹ *Abu Qatada v SSHD* (fn 408) [79].

⁴¹⁰ *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808.

⁴¹¹ *RB (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110.

⁴¹² *A and Others v Secretary of State for the Home Department; X and Another v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

it, meant that the Jordanian authorities were likely to make sure that he was not ill-treated in custody...'⁴¹³

The House of Lords went on to consider Abu Qatada's rights under Article 6 following the Court of Appeal decision. The Court of Appeal disagreed with the findings of SIAC under Article 6, a decision that was subsequently overruled by the House of Lords, which will be discussed below; from which Abu Qatada appealed to the ECtHR.⁴¹⁴ The Strasbourg Court agreed with the findings of SIAC and the House of Lords of Qatada's Article 3 rights. The court believed that despite the Jordanians use of torture, the assurances under the MOU between the UK and Jordan provide sufficient guarantees enabling the court to find that he would not face a 'real risk' of ill-treatment. However, although the court did not find a real risk of Article 3 being breached, it agreed with the Court of Appeal that deportation to Jordan would involve a flagrant denial of justice for the deportee under Articles 6. The assessment by the court in relation to Qatada's Article 6 right will be discussed later in this chapter.

These judgments by the domestic and European courts show a contrary application of Article 3 not being an absolute right. The legal challenges by Abu Qatada confirm that DWA can be used as a way of circumventing the absolute nature of Article 3. The danger of this is that it can empower the executive to enter bi-lateral agreements with states that are not signatories of the ECHR, expecting the receiving state to comply with the terms of the DWA; the risks involved in this will be examined later. Overall this assists in this thesis consideration of whether DWA is an effective measure to counter-terrorism and support of the UK Strategy 2011. Whilst it does assist in the deportation of terrorist suspects, which is one of the aims of the strategy, the protections provided by the ECHR can be watered-down, including non-derogable rights. This questions whether it is possible to re-balance the rights of the individual with national security.

⁴¹³ A and Others v Secretary of State for the Home Department; X and Another v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68, paragraph 52.

⁴¹⁴ Judiciary of England and Wales 'Mohammed Othman (Abu Qatada) v Secretary of State for the Home Department – Special Immigration Appeals Commission' Summary to Assist the Media (12th November, 2012) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/abu%20qatada%20siac%20approved%20summary.pdf>> accessed 16th September 2013.

(ii) *When would a risk of mistreatment be 'real'?*

It is important to understand that in many cases it is unlikely that a deportee will be aware of the case against them, the grounds upon which the allegation of terrorism is made or how such evidence has been obtained; all they will know is that they are a terrorist suspect and are being deported. It is incumbent upon them to raise the argument and prove that they face a 'real risk' of mistreatment which would be in contravention of Article 3. Whilst the contracting state has a duty not to deport a person to a country where there is a 'real risk' they will be mistreated, it is worth asking: to what degree does the risk need to be 'real'? Justice and Human Rights Watch made clear in their written submissions in the *Othman v Secretary of State for the Home Department*⁴¹⁵ that due to the absolute nature of Article 3 there can be no 'acceptable level' of mistreatment (*RB* and *U*, *OO* cases). In the *Soering* case the deporting government would bear responsibility 'for all and any foreseeable consequences',⁴¹⁶ which was reaffirmed by *Nnyanzi v United Kingdom*.⁴¹⁷ This creates a strict responsibility upon the UK government to ensure that its deportees face a zero risk of harm upon their return. Cynically one may argue that this requires a precise calculation of certainty, which is not possible due to the nature and characteristics of 'pre-emption' and 'prevention' (see Chapter One).

As previously mentioned, the responsibility on the deporting state is to protect the deportee and their Article 3 rights; it was recognised in *Salah Sheekh v Netherlands*⁴¹⁸ that this responsibility comes into play the moment the threat to the deportees' rights is 'foreseeable'.⁴¹⁹ When assurances are being used with a receiving state known to have atrocious human rights record, the question is: can any assurance given be enough? In terms of risk assessment, the calculation of foreseeability comes from the regularity of previous incidents which can easily be confirmed by public records such as the news, or independent reports from various organisations (eg Amnesty International and Human Rights Watch). Independent organisations have proved instrumental in assisting SIAC, as well as domestic

⁴¹⁵ *Othman v Secretary of State for the Home Department* [2008] HRLR 26; [2008] 3 WLR 798; [2008] UKHRR 761; [2008] EWCA Civ 290.

⁴¹⁶ *Soering v United Kingdom* (fn 359) [86].

⁴¹⁷ *Nnyanzi v United Kingdom* (2008) 47 EHRR 18, paragraph 54.

⁴¹⁸ *Salah Sheekh v Netherlands* (2007) 45 EHRR 50.

⁴¹⁹ *Ibid* [148].

and international courts, to determine whether a person could safely be deported (see the joint submissions drafted by them in the case of *RB (Algeria)* and *U (Jordan)*).⁴²⁰

(iii) *During a state of emergency should the government be able to deport suspects?*

UK politicians have considered whether it can be justified to deport a suspect knowing that there is a real risk to their Article 3 or 6 rights; they have expressed a belief that the human rights principles should change. This argument was strengthened by the then Lord Chancellor, Lord Falconer, when instructing British judges that they should interpret and apply Article 3 more restrictively than the *Chahal* case provides and give weight to the national security argument (Bennion, 2005). In a similar context the then Home Secretary, Charles Clarke MP, remarked that the Convention was “outdated and unbalanced”,⁴²¹ this opinion is shared by Lord Carlile QC (2011) when suggesting that the ECHR needed updating to fit ‘the modern world.’⁴²² In 2006 the then Leader of the Conservative Party, David Cameron MP, stated that:

"A Home Secretary must have more flexibility in making a judgment in the public interest, balancing the rights of terror suspects against the rights of British citizens. At present the jurisprudence from cases such as *Chahal* prevent this happening...I believe it is wrong to undermine public safety – by allowing highly dangerous criminals and terrorist to trump the rights of the people in Britain to live in security and peace."⁴²³

This remark suggests that there should be deferential attitudes by the judiciary in support of government opinion, an issue discussed in Chapter Three when examining the control order regime and risks linked to securitization. Turner (2011) believes that ‘legitimate acts of ill-treatment should be confined to special circumstances such as war or public emergency’,⁴²⁴ therefore by relaxing the requirements of Article 15, this would require states to show it is

⁴²⁰ Othman v SSHD (fn 415).

⁴²¹ Clarke MP (fn 389).

⁴²² Lord Carlile QC (fn 8).

⁴²³ McGhee (fn 373).

⁴²⁴ Ian D. Turner 'Freedom from Torture in the "War on Terror": Is it Absolute?' 2011 Terrorism and Political Violence 23(3): 419-437.

necessary for them to act outside of the obligations prescribed under the ECHR. The Strasbourg Court has considered whether it should be possible to create a balancing act between the individuals' rights under the ECHR with the need to protect national security; in doing so they referred to the Supreme Court of Canada in *Suresh v Canada*.⁴²⁵ In the *Suresh* case the deportation of a terrorist suspect who faced a risk of torture upon arriving in the receiving state was deemed acceptable in extreme circumstances, this became known as the 'Suresh exception'. The UK sought to introduce a proportionality test, similar to the Suresh exception', in the 'test case' of *Ramzy v The Netherlands*,⁴²⁶ this was an attempt to overturn the *Chahal* case. Although the *Ramzy* case was overtaken by other countries, including the UK, the ECtHR was left to consider the *Saadi* case instead (Horne and Gower, 2013). It rejected the Suresh exception and any process by which Article 3 could be varied, reaffirming its belief that Article 3 is absolute and no provisions should be made to derogate from this (Turner, 2011).

Whilst Turner (2011) argues for a system to allow the government to breach ECHR obligations under exceptional circumstances, there is concern that the UK on one hand is one of the world's champions of human rights but is 'fast becoming one of the world's notorious abusers of human rights' (Fekete, 2005: 25; McGhee, 2008: 12). Case law at domestic and international level demonstrates that deportation of suspects is acceptable when evidence is adduced to prove the real risk the deportee would face has been removed. However, assurances are not necessarily safeguards from harm, as Cernic (2008) suggests they should be 'assessed with a pinch of salt, particularly in states where systematic human rights violations occur'.⁴²⁷ The case of *AS (Libya) v Secretary of State for the Home Department*⁴²⁸ where the Court of Appeal considered the MOU between the UK and Libya carefully due to the controversial practices of the latter state, held that assurances are not sufficient in and of themselves because they failed to protect Article 3 rights. Cernic (2008) remarks that for the

⁴²⁵ *Suresh v Canada* [2002] 1 SCR 3.

⁴²⁶ *Ramzy v the Netherlands* (2005), Observations of the Governments of Lithuania, Portugal, Slovakia and the UK Intervening in Application No 25424/05 (Eur Court HR 2005) [12].

⁴²⁷ J L. Cernic 'National Security and Expulsion to a Risk of Torture' 2008 *Edinburgh Law Review* 12(3): 486-490, 490.

⁴²⁸ *AS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289.

courts a 'hypothetical prospective assessment' (2008: 488) is used and considers the probability of the future, describing it as a "pure hypothesis" of risk'.⁴²⁹

Assessing risk in this way is best viewed as an activity similar to calculating future risk and whether terms of a contract, or the given assurances, prevent that risk and assist the UK in its obligations under Articles 3 and 6. It becomes difficult if not impossible for such assurances to give any guarantee of protecting human rights, there will remain the risk of harm given historical practices and traditions of states. Therefore the precautionary approach, as discussed in Chapters One to Three, would take the view that courts should not support DWA due to the uncertainty of the future. The Othman legal challenges demonstrated that the human rights concerns are not just related to Article 3 ECHR, it also extends to matters relating to Article 6 when evidence obtained by torture may be used in subsequent legal proceedings. The risks of torture being used against a deportee was not the only issue that required assurances to safeguard, there have also been concerns relating to procedural fairness and other protections offered by Article 6.

Article 6 and the right to a fair trial

When considering the legal procedure guaranteed under the criminal justice system with that of counter-terrorism measures, specifically control orders and TPIMs, Article 6 guarantees have been widely interpreted and applied by government. The government introduced procedural requirements which have been viewed as procedural safeguards, such as special advocates and closed hearings; these have enabled the UK government to enforce questionable counter-terrorism measures (see Chapter Two and Three). S44 and control orders have seen the use of limited judicial involvement or introduced quasi-judicial roles which favour the executive and emanations of state (eg the police). As each chapter discusses, safeguards have been developed in an attempt to retain basic procedural rights, such as disclosure of the case and innocence until proven guilty; Chapter Three discusses matters regarding special advocates and closed hearing process which are relevant when discussing DWA. With DWA, the two main procedural issues relate to a suspect knowing the case against them and their inability to prove their innocence; similar to control orders.

⁴²⁹ Cernic (fn 427) 488.

However, unlike control orders suspects subject to DWA have more to lose than just their liberty as discussed earlier in this chapter. As this section of the chapter will explain, non-compliance with the Article 6 rights and poor safeguarding exposes the suspect to a risk of mistreatment and miscarriage of justice.

(i) *Procedural fairness: disclosure and flagrant denial of justice*

As seen in Chapter Three, disclosure of the evidence and material has been considered extensively by the courts. Following those discussions, this chapter can extend the analysis of the rights of a suspect and procedural fairness, or their right to know the case against them through disclosure of the evidence. Although related to control orders, *AF (No 3)* provided a clear requirement that minimal disclosure providing sufficient information to instruct their legal representatives, known as 'gisting'.⁴³⁰ The argument for strengthening the information disclosed to suspects has developed in light of *A v United Kingdom*.⁴³¹ In reference to *Re K (Infants)*⁴³² Dinah Rose QC, at the Atkin Memorial Lecture (2011), reaffirmed the remark by Upjohn LJ that an:

"...interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account...the proceedings cannot be described as judicial."⁴³³

This Dinah Rose QC described as "natural justice";⁴³⁴ although this is not necessarily the principle being applied in deportation matters.

⁴³⁰ Joint Committee on Human Rights, (2012-2013a) 'Legislative Scrutiny: Justice and Security Bill', Fourth Report (6th November 2012), HC 370/HL 59, paragraph 72.

⁴³¹ *A v United Kingdom* (2009) 49 EHRR 29.

⁴³² *Re K (Infants)* [1963] Ch 381.

⁴³³ Dinah Rose QC (2011) Atkin Memorial Lecture, 'Beef and Liberty: Fundamental Rights and the Common Law', paragraphs 405 and 406: http://www.reprive.org.uk/publications/2012_01_12_atkin_memorial_lecture/ (Last accessed 4th February 2013).

⁴³⁴ *Ibid.*

The process of deporting foreign nationals on national security grounds has similarly raised this issue of disclosure under Article 6. The cases of *IR, GT, AN and AK v Secretary of State for the Home Department*⁴³⁵ came to consider whether the Article 8 protections of 'no interference by a public authority'⁴³⁶ enabled the same level of procedural fairness under Article 6 as that provided by *AF (No 3)* for controlees. The case was an appeal from SIAC⁴³⁷ in which Mitting J held that 'Article 6 does not apply to these proceedings'⁴³⁸ and that protections and entitlements are contained in the SIAC Procedure Rules; therefore Article 8 does not apply to provide protections under Article 6. Interestingly, Mitting J held that Article 8 was engaged because they had been in the UK for a period of time they would have a private life, whether they had family or not, which may be interfered with as a result of deportation; however, this did not change the findings of SIAC. Maurice-Kay LJ upheld SIAC, finding that it had not erred in law meaning that Article 8 does not provide the same level of procedural fairness in deportation matters as seen with Article 6 and control orders.

This judgment echoes concerns and risks discussed in previous chapters about the importance of knowing the case and allegations made and on what grounds they are based. Firstly, knowing the grounds on which the Home Secretary has made their decision may assist in identifying any flaws in the decision itself. Secondly, as discussed in Chapters Two and Three, the intelligence used to form such decisions may be based on inaccurate and fragmented information, which could be easily explained or re-buffed. More importantly, it may help in identifying those sources of information obtained by torture or other forms of inhumane treatment. The impact of the decision of the *IR and Others* case goes further to support the concerns that measures of securitization support the executive to achieve its aims in 'national security' whilst individuals have little remedy. The decision of *IR and Others* demonstrates a willingness to deprive suspect's natural justice, which one may argue has a negative impact on the moral standing of the UK and may have significant repercussions for individuals yet to be convicted of any wrongdoing.

⁴³⁵ *IR, GT, AN and AK v Secretary of State for the Home Department* [2011] EWCA Civ 704.

⁴³⁶ Article 8(2) European Convention on Human Rights.

⁴³⁷ *IR v Secretary of State for the Home Department* [2009] United Kingdom: Special Immigration Appeals Commission (SIAC) (70/2008).

⁴³⁸ *IR v Secretary of State for the Home Department* [2009] United Kingdom: Special Immigration Appeals Commission (SIAC) (70/2008), paragraph 4.

In the most recent *Othman* case at SIAC⁴³⁹ it was found that 'an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country'.⁴⁴⁰ It was explained that the breach had to be towards the principles of having a fair trial as guaranteed under Article 6 and had to be flagrant. The issues surrounding Article 6 are not just related to evidence being obtained by torture, it also applies to the basic protections the deportee would be entitled to in the receiving state. To do this the UK would be responsible for assessing and ensuring the procedures are in place to guarantee the basic protections under Article 6. Whilst the UK deportation process need not take into account Article 6, it is a matter it considers if the deportee is at risk of suffering from a flagrant denial of justice.

(ii) *Procedural fairness: Burden of proof*

The *Saadi* case has been used to understand the burden of proof when considering the relationship of Article 3 with DWA. The same principle is applied to Article 6 and it was determined that the appellant must adduce evidence to prove there are substantial grounds to believe they would be exposed to a 'flagrant denial of justice'⁴⁴¹ if deported. It therefore follows that once the evidence is adduced, the government must dispel the identified doubts. In this context, the government only needs to demonstrate that there is not a real risk of the deportee being exposed to a flagrant injustice, which assurances may assist with. In *Othman v Secretary of State for the Home Department*⁴⁴² Buxton LJ cited the Strasbourg Court and identified that a 'high degree of assurance' is required before a person may be deported to face trial which may involve evidence obtained by torture (*Othman v Secretary of State for the Home Department* 2008: 49).

⁴³⁹ *Abu Qatada v Secretary of State for the Home Department* (2007), SC/15/2005, United Kingdom: Special Immigration Appeals Commission (SIAC), 26th February 2007.

⁴⁴⁰ *Abu Qatada v Secretary of State for the Home Department* (2007), SC/15/2005, United Kingdom: Special Immigration Appeals Commission (SIAC), 26th February 2007, paragraph 258.

⁴⁴¹ *Saadi v Italy* (fn 402) [129].

⁴⁴² *Othman v SSHD* (fn 415).

In the recent *Othman* case⁴⁴³ after finding that the assurances given by Jordan could be relied upon, the central issue was whether there was a real risk that the evidence obtained by torture would be used at his trial. Applying *Gafgen v Germany*⁴⁴⁴ the court believed that admittance of such evidence would be a ‘flagrant denial of justice’,⁴⁴⁵ determining whether the risk was real required consideration of some factors, including:

- (1) The history of the accused trials;
- (2) Provisions of the receiving states constitution and criminal procedures;
- (3) The receiving states case law;
- (4) The attitude of the state authorities with regard to the suspects return and prospective retrial;
- (5) Nature and composition of the court which will try him.

These factors provide the court with a basic holistic assessment, enabling real consideration of the risk and whether it has been or can be averted through the assurances. Not forgetting the above discussion on Article 3, signatories to the ECHR are expected to actively prevent the use of torture from being used or applied to suspects. It would appear that Articles 3 and 6 adopt a positive approach to Conventional obligations when applied to deportation cases, whilst for governments it may appear that application of the Convention make it harder to deport suspects.

(iii) Evidence obtained by torture

As explained in Chapter Three and earlier in this chapter, being aware of the case against you is of fundamental importance, enabling the accused to defend and rebut the allegations made. Disclosure in deportation cases is not required, the state does not have to provide a gist of the evidence unlike other counter-terrorism measures following the *AF (No 3)* decision. The deportee needs to establish that torture or mistreatment has been used, either against him or others or that it would be used. Unlike Abu Qatada who knew of the evidence against him, the same cannot necessarily be said for others. As discussed in the previous chapters, evidence which is intelligence-led can be fragmented, disjointed and unclear or vague. It is important to remember, as it was in Abu Qatada’s case, the evidence may have been obtained

⁴⁴³ *Othman v SSHD* (fn 379).

⁴⁴⁴ *Gafgen v Germany* [2011] 52 EHRR 1.

⁴⁴⁵ *Ibid* [267], [269]-[272].

by torture, if a deportee is unaware of the evidence against them, they are unable to legitimately question or raise concerns over their Article 3 and 6 rights.

Some may argue that the utilitarian approach of saving many lives is welcomed, even if that outcome is achieved by obtaining evidence by the torture of an individual. Securing the removal of a terrorist threat is the objective and Lord Phillips, the then President of the UK Supreme Court, suggested that where torture may have been used the actions could be “forgiven” if used to find a bomb: “[t]he classic answer is that the law can never justify the use of torture, but in a situation such as that the [individual] might be forgiven for acting in a manner that was unlawful.”⁴⁴⁶ Adhering to values, such as human rights and the rule of law, is ‘[t]he core role of any state which is to guarantee basic human rights: life, security, the rule of law’ (Bulley, 2008: 85) and the contradiction to this by Lord Phillip raises the debate of whether torture can ever be justified; a debate that will not be examined here. In the *Belmarsh* case, Lord Hope ruled out any support for torture and its ‘use’ to obtain evidence or achieve advantageous outcomes (eg deportation): ‘[o]nce torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use.’ By not following the *AF (No 3)* case and providing minimal disclosure, it means that the courts may well accept evidence in closed hearings that have been unknowingly obtained by torture or mistreatment; if this then forms the basis for which the suspect is identified as posing a terrorist threat, it becomes unsafe to deport them and the UK has a responsibility not to do so.

The *Belmarsh* case confirmed that information obtained by torture could not be taken into account when determining whether to detain foreign terrorist suspects. It is important therefore, that the courts account for the means by which evidence has been obtained in order to facilitate the assessment of the quality and validity of any assurances. In the *Belmarsh* case Lord Bingham cited the US Supreme Court Justice Felix Frankfurter from the US case *Rochin v California*;⁴⁴⁷ Frankfurter remarked that due process rested on whether the actions by a party had offended: “those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous

⁴⁴⁶ Turner (fn 424) 429.

⁴⁴⁷ *Rochin v California* (1952) 342 US 165 [169].

offenses." (Donohue, 2008). The poor human rights records of receiving states have to be considered as it becomes more likely that any evidence obtained by that state may originate by acts of mistreatment. It is therefore important that the deportee can identify whether they believe such evidence has been obtained in such a way. Lord Hoffman in the *Belmarsh* case stated that "the use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it".⁴⁴⁸ Ultimately therefore, creating or allowing a counter-terrorism immigration system that does not allow the deportee an opportunity to identify and challenge such evidence, may be considered dishonourable. Dishonourable behaviour such as this, risks the UK losing any recognition and stance it has on pro-human rights and anti-torture.

Othman v United Kingdom: Article 6

As discussed earlier, Abu Qatada had challenged his deportation notice on the belief that his Article 3 and 6 rights would be breached upon his return to Jordan. Having considered the Article 3 arguments earlier, it is now worthwhile turning to the decisions regarding Article 6. Originally SIAC had concerns relating to Abu Qatada's Article 6 protections, particularly in relation to the use of evidence obtained by torture in a retrial. SIAC concluded that it was for the deportee to prove to the Jordanian authorities that the statements had been obtained by means of mistreatment, even though it was accepted by SIAC that the court and prosecutor were not independent. Despite the courts suspicions of the origins of the evidence obtained, SIAC held that the test whether 'there was a real risk of a "total denial of the right to a fair trial"' was not satisfied. There was not a 'total denial' because Qatada may challenge the evidence which it was suspected had been obtained by torture, thus it was held that Abu Qatada's Article 6 rights were not at risk of being breached. In a subsequent appeal, Buxton LJ⁴⁵⁰ determined that the deportation of Abu Qatada would involve a breach by the UK of his Article 6 rights given that evidence obtained by torture would be used at his retrial. Therefore Qatada could not be deported on Article 6 grounds.

⁴⁴⁸ A and Others v SSHD (fn 24) [89].

⁴⁴⁹ RB (Algeria) and OO (Jordan) v SSHD (fn 21) [59].

⁴⁵⁰ Othman v SSHD (fn 415).

When the UK government appealed the Court of Appeals findings, the House of Lords went on to consider Abu Qatada's rights under Article 5 and his belief that the Jordanian constitution enabled the authorities to detain him for long periods of time; depriving him of his liberty. Ultimately the court held that 'there was no real risk of a flagrant breach of Mr Othman's right to liberty under Article 5.'⁴⁵¹ The House of Lords⁴⁵² clarified that for there to be a violation of the deportees rights, there must be substantial grounds for believing there is a real risk:

- (i) That there will be a fundamental breach of the principles of a fair trial guaranteed by Article 6; and
- (ii) That this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights.

The House of Lords confirmed in its judgment that SIAC had recognised that Articles 3 and 6 are linked by the fact that evidence obtained by torture, and used in proceedings, breached Article 6 as it would be unfair; however, it would be a breach of Article 3 given that the ECHR prohibits the use of and acceptance of torture. The House of Lords agreed with SIAC and found that there was not a total flagrant denial of justice as Qatada may challenge it in court, therefore by this reasoning SIAC had not erred in law and unanimously upheld the earlier ruling, overruling the Court of Appeal.⁴⁵³ Following this decision the Home Secretary served a deportation notice upon Qatada (Duffy, 2012).

The House of Lords decision was a disappointment to human rights groups, such as Justice, due to the 'well-established reputation of both countries for torturing detainees',⁴⁵⁴ Metcalfe (2009) described the decision as:

'...a step backwards in the international fight against torture.

⁴⁵¹ RB (Algeria) and OO (Jordan) v SSHD (fn 21) [53].

⁴⁵² RB (Algeria) and OO (Jordan) v SSHD (fn 21) [141].

⁴⁵³ Othman v SSHD (fn 415).

⁴⁵⁴ Justice 'Law Lords Deportation Ruling Undermines Torture Ban' (18th February 2009b) <www.justice.org.uk/data/files/resources/78/18feb09-Law-Lords-deportation-ruling-undermines-torture-ban.pdf> accessed on 6th May 2013.

A promise not to torture from a regime that tortures its own people is worth nothing. It is shameful that the government negotiated these deals in the first place, and saddening that the courts have refused to intervene to stop them.

...today's ruling shows that the UK is still clinging to paper promises from tortures.⁴⁵⁵

Appealing the House of Lords' decision, the ECtHR⁴⁵⁶ reaffirmed the 'flagrant denial of justice' test as originally set out in the *Soering* case:

It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed...he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.⁴⁵⁷

The flagrant denial of justice test is a stringent test of unfairness, giving consideration to the principles guaranteed by Article 6. The court deemed that evidence obtained by methods considered to breach Article 3 and then used in trials, does amount to a flagrant denial of justice. Admitting such evidence is considered 'manifestly contrary, not to the provisions of Article 6, but to the most basic international standards of a fair trial'.⁴⁵⁸ The ECtHR identified two questions to consider:

- (1) Whether a real risk of the torture evidence being admitted was sufficient to breach Article 6; and
- (2) If so, whether there would be a 'flagrant denial of justice'.

The court agreed with others that the evidence from Abu Hawsher and Al-Hamasher had been obtained by torture, the court still assessed whether there was a 'real risk' of torture evidence being used; it relied upon the general knowledge of the receiving states practices.⁴⁵⁹ Considering submissions by various international bodies, the United Nations Committee Against Torture expressed concern of widespread practices of force being used to obtain

⁴⁵⁵ Ibid.

⁴⁵⁶ *Othman v SSHD* (fn 379) [2].

⁴⁵⁷ *Soering v United Kingdom* (fn 359).

⁴⁵⁸ *Othman (Abu Qatada) v United Kingdom* (fn 341) [264]-[267].

⁴⁵⁹ Ibid [277].

confessions later used in court; the Jordanian State Security Court provided guarantees to defendants. The ECtHR was unconvinced that the legal guarantees under Jordanian law had practical value. Consequently the court stated:

'...given the absence of clear evidence of a proper and effective examination of Abu Hawsher and Al-Hamasher's allegations by the State Security Court, the applicant has discharged the burden that could be fairly imposed on him of establishing the evidence against him was obtained by torture.'⁴⁶⁰

'...in the court of the proceedings before this Court, the applicant has presented further concrete and compelling evidence that his co-defendants were tortured into providing the case against him. He has also shown that the Jordanian State Security Court has proved itself to be incapable of properly investigating allegations of torture and excluding torture evidence...'⁴⁶¹

Having believed that Abu Qatada proved that there was a real risk that evidence obtained by torture would be used against him at his retrial, the court needed to consider if there would be a flagrant denial of justice as a consequence. Consideration was given to the findings of SIAC from its judgment on the 26th February 2007, finding that it was highly probable that the evidence obtained against Qatada would be used against him at trial and would be of such importance in the case against him. Likewise, the ECtHR agreed with the Court of Appeal and held that a flagrant denial of justice would arise with the evidence obtained by torture being used against him.⁴⁶² The Strasbourg decision meant the UK was unable to deport Abu Qatada because there was a real risk that evidence obtained by torture would be used in a retrial. The then Home Secretary, Theresa May MP, did not appeal the decision to the Grand Chamber of the ECtHR and was criticised by political opponents for not doing so; she responded by stating that doing so '...would have jeopardised the government's wider deportation with assurances programme and would have risked the blockage of many other deportation cases.'⁴⁶³

⁴⁶⁰ Ibid [280].

⁴⁶¹ Othman (Abu Qatada) v United Kingdom (fn 341) [285].

⁴⁶² Othman (Abu Qatada) v United Kingdom (fn 341) [282].

⁴⁶³ House of Commons 'Abu Qatada' 2012-2013 Hansard (24th April 2013) 561(145): 887-901, 888.

Both the UK and Jordan continued with their negotiations to secure further assurances that would comply with the Strasbourg decision and enable his deportation. Assurances included the 'qualification that the Jordanian government could not interfere with the judicial decision-making...they would do everything in their power to ensure that a retrial was fair'.⁴⁶⁴ The primary focus of the assurances would be to ensure 'the court at the retrial would be impartial, independent and could approach the case fairly and conscientiously'.⁴⁶⁵ Following these assurances, the Secretary of State notified Abu Qatada of her intention to deport him again as it was believed that the real risk identified by the ECtHR had been removed. Refusing to revoke the notice Abu Qatada appealed to SIAC; the judgment given by Mitting J, Upper Tribunal Judge Lane and Dame Holt allowed his appeal on the 12th November 2012.

(i) *The SIAC appeal (12th November 2012)*

SIAC had identified three key elements of risks to assess in order to determine whether Qatada could be deported:

- (1) The risk that Abu Qatada would be retried for offences of conspiracy to cause explosions;
- (2) The risk that evidence had been obtained by torture; and
- (3) The risk that evidence obtained by torture would be used against him in his retrial.

The former two had already been predetermined by the ECtHR which meant that SIAC only needed to assess the existence of the third element. Not forgetting that the ECtHR had already found that there existed a high probability that evidence obtained by torture would be used against Abu Qatada at his retrial; SIAC was presented with new assurances drafted following the Strasbourg decision between the UK and Jordan. SIAC rejected submissions from Qatada's legal representative that unless Jordanian law satisfactorily established that the risk had been removed, there would remain a real risk of a flagrantly unfair trial. In reference to the Strasbourg decision, it was explained that the ECHR standards binds contracting states (as

⁴⁶⁴ Othman v SSHD (fn 379) [21].

⁴⁶⁵ Ibid.

affirmed by *Drozdz & Janousek v France and Spain*).⁴⁶⁶ Instead the application of a 'high degree of assurance' is relevant before a person may be deported and face a trial where evidence obtained by torture may be used, as stated by Buxton LJ in *Othman v Secretary of State for the Home Department*⁴⁶⁷ and as cited by ECtHR.⁴⁶⁸

Although SIAC initially believed that Qatada did not face a flagrant denial to a fair trial, it conceded that this was not enough to dispose of the Article 6 protections. Instead, they had to consider whether Jordanian law would continue to present a real risk that impugned statements would be admitted at a retrial.⁴⁶⁹ In answering this, SIAC considered Jordanian law and identified two 'critical questions':

- (1) Irrespective of how the evidence was obtained, would the 'impugned statements' be admissible under criminal practice?
- (2) Would recent amendments to Jordanian Constitution alter the rules of the admissibility of confessions obtained by torture so to satisfy Article 6 ECHR requirements?

When considering the first question and following much discussion and debate with the expert evidence, SIAC believed that until a ruling had been given by the Jordanian courts (Court of Cassation) on this matter, the Secretary of State had failed to establish there was no real risk of impugned statements being admitted as evidence. When turning to the second question, SIAC considered amendments made under Jordanian Constitution. It was believed that the amendments made 'may have the effect of making it easier to challenge confessions allegedly procured by torture.'⁴⁷⁰ SIAC believed that given the effect of the amendment being unknown, there would 'remain at least a real risk'⁴⁷¹ that the impugned statements would be admitted.⁴⁷² Again, a ruling by the Jordanian courts on the matter and imposing a 'burden of

⁴⁶⁶ *Drozdz & Janousek v France and Spain* [1992] 14 EHRR 745.

⁴⁶⁷ *Othman v SSHD* (fn 415) [49].

⁴⁶⁸ *Othman (Abu Qatada) v United Kingdom* (fn 341) [51].

⁴⁶⁹ *Mohammed Othman (Abu Qatada) v SSHD* (fn 391) [49].

⁴⁷⁰ *Ibid* [70].

⁴⁷¹ *Ibid* [72].

⁴⁷² *Ibid* [73].

proof that the statements were not obtained by torture on the state prosecutor⁴⁷³ would likely address SIAC's concerns.

The SIAC ruling itself reaffirmed the ECtHR stance of having a low burden of proof placed upon deportees alleging there is a real risk of evidence obtained by torture will be used against them. This is because, as the ECtHR explained, proving such 'will be difficult to discharge'.⁴⁷⁴ Calculating the risk level, SIAC have begun to consider the legal parameters of the receiving state and whether it can remove the real risk alleged by the deportee.

(ii) *The Court of Appeal (27th March 2013)*

As a consequence of the SIAC [2012] case,⁴⁷⁵ the Secretary of State appealed to the Court of Appeal on the grounds that:

- (1) SIAC's finding that there was a real risk of a flagrant denial of justice unless it could be established, under Jordanian law, with the prosecutor proving to a high standard, that the impugned statements would not be admissible at his retrial;
- (2) SIAC failed to consider whether there had been a real risk of flagrant denial of justice in the round.

The Court of Appeal agreed with the findings of SIAC in that the provisions of the law in Jordan regarding the burden of proof, are important factors when considering whether there is a real risk of flagrant denial of justice; this was not a determinative factor. Ultimately the court found in favour of SIAC's case by case evaluation as being 'the only way of eliminating a real risk that the impugned statements would be admitted as evidence at the retrial would be to place the burden of proof on the prosecutor to a high standard'.⁴⁷⁶ It found that it was not irrational to believe that due to the amount of time that had passed since the impugned statements were taken 'it may simply be "too late and too difficult" for Mr Othman to

⁴⁷³ Ibid [72] and [73].

⁴⁷⁴ Ibid [73].

⁴⁷⁵ Ibid.

⁴⁷⁶ Othman v SSHD (fn 379) [43].

discharge the burden of proof if it were placed on him.⁴⁷⁷ The findings of the Court of Appeal upholding the original decision by SIAC, both gave support and application to the earlier ECtHR ruling.

The second ground for appeal, which related to the consideration of risk and ‘critical questions’ identified by SIAC had already been established by the ECtHR, the impugned statements had been obtained by torture; the ECtHR had noted that Abu Qatada had presented "further concrete and compelling evidence that his co-defendants were tortured into providing the case against him."⁴⁷⁸ SIAC had to consider the risk that the statements had been obtained by torture and then take into account the 'seriousness of the risk of the evidence being admitted'.⁴⁷⁹ As the ECtHR had already adjudicated on the first consideration, SIAC only needed to focus on the risk that it would be used at Abu Qatada's retrial. To determine this, the Court of Appeal acknowledged that whilst SIAC identified the two critical questions to consider, other factors were worth taking into account, including: (i) the nature and composition of the court; and (ii) attitude of the judiciary. Agreeing with SIAC, the Court of Appeal believed there was uncertainty in the matters, requiring them to reach the only conclusion that there was a real risk that evidence obtained by torture would be admitted. Mindful that the ECtHR considered whether a state should be prevented from deporting a person to face trial, the Court of Appeal made clear that no distinction should be made between those deemed extremely dangerous with those who are not (*Othman v Secretary of State for the Home Department*). Instead, the Court of Appeal made clear that preventing deportation under Article 6 was about distinguishing the difference between a ‘real risk of a breach’ over a ‘risk of a breach’ to Article 6. The Strasbourg decision set a high standard creating a level of ‘unfairness’ in relation to the burden of proof which the contracting state would have to reach. In the conclusion of its judgment the Court of Appeal explained that torture is abhorrent and cannot be used as a method of obtaining evidence. SIAC's assessment rightly deemed that there remained a real risk that Abu Qatada would be retried with evidence obtained by torture which is a flagrant denial of justice.⁴⁸⁰

⁴⁷⁷ Ibid [45].

⁴⁷⁸ *Othman (Abu Qatada) v United Kingdom* (fn 341) [285].

⁴⁷⁹ *Othman v SSHD* (fn 379) [49]

⁴⁸⁰ Ibid [59].

SIAC as the expert tribunal applied the judgment of the ECtHR, meaning the appeal could only be based on whether SIAC had erred in law. This process interestingly demonstrates the impact that counter-terrorism measures have in terms of the process to deport a terrorist suspects. Jones (2008) describes this appeal process as 'an extensive judicial safeguard'⁴⁸¹ because appeals can only be made from SIAC to the Court of Appeal on points of law, followed by the UK Supreme Court (formerly the House of Lords) then the ECtHR. Importantly, this level of judicial scrutiny positively demonstrates the help risk assessment can have for the courts, but how serious risks should not be taken in the name of national security. This safeguard does not support the government in its end goal to deport foreign nationals which the government label 'extremely dangerous', or unable to prosecute. The Home Secretary announced that immigration laws would be toughened to ensure greater ease to deport:

'I am also clear that we need to make sense of our human rights laws and remove the layers of appeals available to foreign nationals we want to deport. We are taking steps – including through the new Immigration Bill – to put this right.'⁴⁸²

It is important to note that the Immigration Bill 2013 did not alter the deportation process of terrorist suspects. Although the Bill was later enacted and won't be discussed at any great length in this thesis, the announcement at the time risked causing further damage to the UK's reputation. The Immigration Bill was intended to prescribe and codify the application of alleged Article 8 breaches in immigration and deportation cases; it was believed that *MF (Nigeria) v Secretary of State for the Home Department*⁴⁸³ provided "an over generous interpretation of Article 8".⁴⁸⁴ The proposed system under the Immigration Bill would provide courts with a 'tick-box' approach to Article 8, therein creating a predictable system which fails to take a holistic or total risk assessment approach to the existence of any 'real risk' (Ganguin, 2014) which SIAC had under after the ECtHR judgment in the *Othman* case. The response by the Home Secretary perfectly demonstrates the consequences the executive would consider if the courts do not find in their favour.

⁴⁸¹ Kate Jones 'Deportations with Assurances: Addressing Key Criticisms' 2008 International & Comparative Law Quarterly 57: 183-194, 186.

⁴⁸² Home Office 'Home Secretary statement on Abu Qatada' (7th July 2013d)

<<http://www.gov.uk/government/news/home-secretary-statement-on-abu-qatada>> accessed 7th July 2013.

⁴⁸³ *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192.

⁴⁸⁴ Vanessa Ganguin 'Immigration: A hard bill to swallow' The Barrister (13th January – 16th April 2014) 59: 16-18, 17.

Although this is the response of the executive, the case of Abu Qatada exemplifies the courts attitude to the receiving states' values and principles. The courts have not rejected the use of assurances, but require them to provide clear and fair guarantees that receiving states provide the basic rights which many others enjoy under the ECHR. This is particularly important when dealing with countries that has a history of failing to adhere to human rights, otherwise the UK would be unable to deport suspects. On the 10th May 2013, Abu Qatada announced his willingness to return to Jordan once the recently agreed assurances with the UK were ratified into the Jordanian Constitution. This has not only allowed Abu Qatada to dictate when and under what circumstances he would return to Jordan, but has placed the ball firmly in the court of the executive to make sure Jordan changes its Constitution to provide Article 6 protections. This gives rise to the issues of cultural relativism and importing western values to other states, which will be discussed in due course. In July 2013 Abu Qatada left the UK after the Jordanian Constitution had been amended accordingly. Whilst Qatada was considered a terrorist threat, he clearly had legitimate concerns that his human rights would be breached and such findings were not reached after one appeal. Through its reforms the government had already started changing the power of the judiciary and their ability to assess evidence, making it a step further towards securitization and downgrade of human rights.

ASSURANCES AND THE RELATIONSHIP WITH RISK

The discussion of human rights and DWA demonstrates that a paradoxical situation has arisen: the risk of the deportee being mistreated or denied justice are breaches that may be reduced by agreement between two states. Assurances are an attempt to side-step, override or avert the breaches those protections provide and this has created a counter-terrorism immigration system, similar to a counter-terrorism justice system as discussed earlier in this thesis. As seen in the Abu Qatada cases, the evaluation of risk assists in the determination of those assurances. This thesis argues the way in which assurances operate is similar to the formation of contracts, whereby parties identify the terms of a contract, although unlike ordinary contracts, with DWA there is no available remedy to the deportee if those terms were breached. The assurances between two states are based on speculation with the terms being created on the 'unknown and uncertainty future', as a result there are dangers involved including the UK's ability to control and manage the threat posed by the terrorist suspect.

Cernic (2008) describes the process to agree the terms of the assurances as 'hypothetical prospective assessment' (2008: 488). Thomas Hammarberg, Commissioner for the Human Rights of the Council of Europe, has criticised assurances saying:

"[s]uch pledges are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kinds."⁴⁸⁵

Another risk is the impact of cultural relativism and multiculturalism when another state is required, by another states judiciary or negotiated assurances, to adopt or amend their constitution and legislation contrary to their traditions and ideologies.

Memoranda of Understanding: a contract between states

As identified by Fenwick (2007), deportation as a counter-terrorism measure deters any justification for deportation of a suspect on grounds that their Article 3 rights would be breached by using a proportionality test. Instead the government would naturally look at alternative ways to ensure the obligations of Article 3 are met and ensure they can deport the terrorist suspect. As mere 'paper promises' (Roach, 2011) and as seen with SIAC's decision in the most recent Abu Qatada decision, the reliability and credibility of the assurances must be assessed case by case to protect from any real risk of infringements towards Article 3 and 6 (see also *MT (Algeria)* case;⁴⁸⁶ *Y v Secretary of State for the Home Department*).⁴⁸⁷

When compared with other counter-terrorism measures, such as s44 stop and search and control orders/TPIMs, when there exists a level of uncertainty in knowing the full or true risk posed by a terrorist suspect, the UK government has adopted a precautionary approach. Yet,

⁴⁸⁵ Antenor G. Hallo de Wolf and James Watson 'Navigating the Boundaries of Prevention: The Role of OPCAT in Deportations with Diplomatic Assurances' 2009 *Netherlands Quarterly of Human Rights* 27(4): 525-566, 541-542.

⁴⁸⁶ *MT (Algeria) v SSHD* (fn 411).

⁴⁸⁷ *Y v Secretary of State for the Home Department* (2005), SC/36/2005, United Kingdom: Special Immigration Appeals Commission (SIAC) [390].

when they are unable to be certain of compliance with the assurances they do not act so cautiously by refusing to deport and use alternative measures to control and manage the suspect. In *RB (Algeria)*⁴⁸⁸ Mitting J established criteria (set out below) for assurances to cover to allow the deportation of RB. The criteria derived from the *Chahal* case and are considered worthy criteria to apply in all DWA cases:

- (1) Terms of the assurances, if fulfilled, would allow for the safe return of the deportee and would not be subjected to treatment contrary to Article 3;
- (2) Assurances were given in good faith;
- (3) There had to be a sound objective basis to believe the assurances would be fulfilled;
- (4) Fulfillment of the assurances had to be capable of being verified.

The court applied the fourth criterion widely; in the *RB* case, the deportee was being deported to Algeria a country which had refused to allow any monitoring system to be imposed under the assurances. Despite this the court believed that verification of compliance with the assurances could be obtained by NGO's who could independently report back. Although the decision was pre-SIAC's decision in the most recent Abu Qatada challenge, this decision by the court demonstrated a level of deference. In this case there was issue with the safety of the deportee against non-state agents, it was argued that assurances do not operate outside of the state's powers and therefore cannot be agreed within assurances (Lester and Beattie, 2010: 569) meaning RB remained at risk of harm.

The House of Lords in *R (on the application of) Bagdanavicius & Another v Secretary of State for the Home Department*⁴⁸⁹ confirmed that the principles from the *Soering* case apply to deportation cases even when the risk arises from actions of non-state agents. The very fact that the Algerian authorities in *RB* refused verification processes to ensure the fulfillment of assurances was another example of cultural relativism not being considered and impacting upon the negotiation of assurances, which is discussed below. Whilst the court in *RB* believed monitoring can be determined by NGO's, the fact remains that once a suspect is deported their safety cannot be guaranteed. Whilst MOU need to negotiate adequate safeguards for the return of the deportee, Lester and Beattie (2010) rightly remark that 'it is laughable to seek to

⁴⁸⁸ *RB (Algeria) and OO (Jordan) v SSHD* (fn 21).

⁴⁸⁹ *R (on the application of) Bagdanavicius & Another v Secretary of State for the Home Department* [2005] UKHL 38; (2005) 2 WLR 1359.

apply human rights standards in other countries with a bad record of gross violations, but such agreements must not be used as devices to circumvent international human rights obligations.⁴⁹⁰ The Immigration Law Practitioners' Association explained to the Joint Committee on Human Rights that 'the reality is that reliable assurances are simply not within the gift of highly placed officials where security services and those charged with the day to day care of those detained are able in practice to perpetrate torture with impunity'.⁴⁹¹ In the recent case of *XX v Secretary of State for the Home Department*⁴⁹² the Court of Appeal was aware that SIAC applied the fourth criterion even more widely, determining that verification of the assurances being fulfilled would be achieved if "...no contact occurs, it will be obvious that something has gone wrong."⁴⁹³ This wide interpretation allows the government not to negotiate safeguards for verifying compliance, but presents a disillusioned attitude by the courts on the protection of human rights. If safeguards cannot be imposed and guaranteed before a suspect is deported and monitored post-deportation, surely a precautionary approach would deem it risky to deport a suspect at all?

In the *RB* case, Mitting J gives mention to 'good faith' and yet there should be concerns regarding the trustworthiness of assurances. SIAC have themselves scrutinised assurances and have found some to be insufficient, for example a MOU with Colonel Gaddafi's Libya. The former UK government clearly believed that assurances have relevance and can be trusted; yet during the overthrow of Colonel Gaddafi, the UK Prime Minister David Cameron MP stated "we mobilised the international community to protect the Libyan people from Colonel Gaddafi's regime. We have degraded his war machine and prevented a humanitarian catastrophe."⁴⁹⁴ If a state is capable of causing a humanitarian catastrophe, there should be no doubt that any assurances given by them could not be trusted, yet the UK government did see fit to negotiate assurances for the deportation of a suspect; this argument is supported by the UN Rapporteur Against Torture.⁴⁹⁵ This continues to support the argument that under a

⁴⁹⁰ Lester and Beattie (fn 371) 569.

⁴⁹¹ Joint Committee on Human Rights 'Review of International Human Rights Instruments' 2004-2005c Seventeenth Report (31st March 2005) HC 264/HL 99.

⁴⁹² *XX v Secretary of State for the Home Department* [2012] EWCA Civ 742.

⁴⁹³ *Ibid* [21].

⁴⁹⁴ Number 10 Downing Street 'Prime Minister and President Obama: An Essential Relationship' 2012 <<http://www.number10.gov.uk/news/prime-minister-and-president-obama-article-an-essential-relationship/>> accessed: 12th April 2013.

⁴⁹⁵ Crowther (fn 386).

precautionary approach deportation of suspects to countries with questioned human rights is unsafe and any assurances would be untrustworthy.

The scrutiny of assurances has at times been problematic for the government and prevented deportation, particularly when given assurances cannot be held in good faith. The long legal battle to deport Abu Qatada is an example of the problem the government faced at times, in March 2012 the then British Prime Minister, described the frustration at being unable to deport Abu Qatada because:

'[T]he Court said, 'You can't deport this man to Jordan because there's a danger, if he goes to Jordan, he'll be tortured'. So we thought, 'Right, okay, fair point'. We went off to Jordan and we did a deal with Jordan; signed a deportation-with-assurances agreement that there was no way he would be tortured if he was sent to Jordan.'⁴⁹⁶

This remark demonstrates a biased tendency but a degree of naiveté by the government. The earlier discussions on the Abu Qatada cases shows that although the government had made assurances, they fell below that required standard to remove the real risks posed to his human rights. It is important to understand that once a deportee is in the care of the receiving state, the UK has no jurisdiction to hold that state accountable for failing to uphold the agreement. The *Chahal* case helpfully illustrates that assurance guarantees cannot be sufficient when there is a history of human rights violations by the receiving state:

'Although the Court does not doubt the good faith of the Indian Government in providing the assurances...the violation of human rights by certain members of the security forces...is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the...assurances would provide Mr. Chahal with an adequate guarantee of safety.'⁴⁹⁷

The *Chahal*, *Bagdanavicius* and *Abu Qatada* cases demonstrate that the creation of the assurances must take into account the real risks the deportee faces and insulate them from those risks by adopting realistic safeguards. The unstable and calculative aspect of assurances, caused by the unknown future, shows that speculative assessment is needed with

⁴⁹⁶ Number 10 Downing Street <<http://www.number10.gov.uk/news/david-cameron-new-york-university/>> accessed 25th May 2013.

⁴⁹⁷ *Chahal v United Kingdom* (fn 214) [105].

the government taking cautious action. Ericson (2005) best describes the situation as: 'if in doubt about a risky activity with potential for severe consequences pre-empt it through heavy preventative and regulatory efforts...if that fails, ban it altogether'.⁴⁹⁸

'Speculative Assessment' of assurances between states

The process of 'speculative assessment' is best considered as a practice of risk assessment. This sort of process may allow the authorities to conduct a holistic assessment to ensure that safeguards are achieved for the safe return of the deportee; although compliance with the assurances post-deportation is one of the hardest safeguards to achieve, yet one of the most important. As Lord Goldsmith QC remarked '...[an] important factor...was that there was adequate provision for compliance with the assurances to be verified'.⁴⁹⁹ Provisions which provide continuity and compliance are vital to ensure assurances are not falsely given by a state seeking the deportation of a suspect. Ericson (2005) explains that risk assessment is rarely based on perfect knowledge and 'frays into uncertainty',⁵⁰⁰ as was suggested earlier in this chapter. It is best understood that forms of uncertain knowledge are calculated by 'foreseeability', 'reasonable foresight' and 'expectation' which Ericson identifies as pragmatic tools of assessment used by contract and tort law. Similarly, O'Malley (2004) describes contract law as being a practice to the 'law of uncertainty' because contracts look at how to deal with reasonably foreseeable outcomes through the use of contractual stipulation and agreed terms; in this sense the same principle can be applied to the assurances agreed between states. Utilising this principle would enable countries to identify terms that assure short-term and long-term protections to Article's 3 and 6 and then a suspect could be safely deported. Such an approach deals with risk, taking into account uncertainties that are believed to exist such as fluctuations in the market. Therefore, terms are negotiated to protect both buyer and seller in a contract of sale (Ericson, 2005). Interestingly, Ericson (2005) furthers this discussion, detailing the use of gambling, speculation and insurance within which risk calculation is used to identify 'risks of future events'.⁵⁰¹ The issue of agreeing and enforcing the remedies in the eventuality those assurances are breached remains in issue, this is a natural characteristic of uncertainty.

⁴⁹⁸ Richard Ericson 'Governing through risk and uncertainty' 2005 *Economy and Society* (November) 34(4): 659-672, 661.

⁴⁹⁹ Goldsmith QC (fn 335) 1168.

⁵⁰⁰ Ericson (fn 498) 660.

⁵⁰¹ *Ibid* 664.

As mentioned in Chapter One uncertainty is ‘incalculable’, meaning the courts and government can only negotiate assurances on ‘estimation’. It is for this reason that attempting to be aware of the possible catastrophes, as well as their probability and magnitude, remain unclear. Applying this principle to DWA it is not possible to know whether specific assurances will work. However, as explained earlier in this chapter, it is possible to calculate the likelihood and magnitude of the receiving state breaching human rights when taking into account its past record. The inability to guarantee remedies to a deportee if assurances are not adhered to, means it is not possible to give assurances that are proportionate (Fenwick, 2007), instead they must eliminate the risk (see the *Saadi* case). This argument was supported by Gil-Robles, a former Council of Europe Commissioner for Human Rights: '[d]ue to the absolute nature of the prohibition of torture or inhumane or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.'⁵⁰²

The strict obligation of Article 3 coupled with states known to have poor human rights, means negotiating assurance will not be straightforward. Achieving this would require the ‘precautionary principle approach’ to be taken, as previously mentioned. As Beck (1998) and Ewald (2002) explained this would only be used when there is uncertainty or no conclusive evidence until the realisation of harm. In deportation cases, to wait until the realisation of harm would be impossible to remedy, as mentioned previously, once the deportee is deported the UK has no control or management of the threat they pose. As mentioned earlier, when states enter negotiations over the deportation of a suspect, there can be a risk that there will be a conflict between one another’s traditions and ideologies in an attempt to protect the deportees human rights; this can best be labelled as a cultural relativism issue.

Multiculturalism and cultural relativism

One of the risks involved in negotiating assurances comes from universal multiculturalism and the part cultural relativism plays within those negotiations. Jabri (2008) has remarked

⁵⁰² Alvaro Gil-Robles Commissioner for Human Rights on his visit to Sweden: 21st – 23rd April 2004 (8th July 2004)
<<https://wcd.coe.int/ViewDoc.jsp?id=758789&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>> accessed 5th June 2014.

that since the adoption of the 'war on terrorism', multiculturalism has been associated with insecurity and the perception that cultural difference is the potential source of the existence of the threat and danger. When negotiating assurances, the UK government has to be aware that they cannot force upon another state western ideologies or opinions. This means that the UK cannot force Jordan and others to accept and embrace Articles 3 and 6, as confirmed by the ECtHR in *Drozdz & Janousek v France and Spain*.⁵⁰³ Interestingly, as remarked by Bulley (2008), Jack Straw MP the then UK Foreign Secretary, believed that measurement of the success of states comes from their adoption and use of human rights and the rule of law: "[T]he key measure of a state's success is the extent to which it guarantees the human rights of its population."⁵⁰⁴ It was further explained that these can be used as an 'early warning system' of future crises and failures (Bulley, 2008). If this is true, then negotiating terms of human rights compliance with a state known to have poor regard to such rights, should provide an early warning that they are unlikely to comply with such assurances; this gives rise to the precautionary principle discussed earlier.

Post-9/11 emotive language was used by the former UK prime Minister, Tony Blair MP, suggesting that when other countries fail in their responsibilities, it is for other states to act (Doorstep press conference in Beijing, 21st July 2003).⁵⁰⁵ Following from this, Jack Straw MP supported state intervention where relevant:

'States have the right to non-interference in their international affairs; but they also have responsibilities, towards their own people, and towards the international community and their international engagements. Where those responsibilities are manifestly ignored, neglected or abused, the international community may need to intervene: the cost of failing to do so in Rwanda or in Bosnia still haunts us today.'⁵⁰⁶

Bulley (2008) and Jabri (2008) explain that the reason such language or such a political stance is taken is to achieve 'securitization' (see Chapter Three). Although it can apply to deportation cases when intervention by one state to deport a suspect does so by 're-shap[ing], re-form[ing], re-design[ing] the very subjectivity [of such as deportation]...in the name of

⁵⁰³ *Drozdz & Janousek v France and Spain* (fn 466).

⁵⁰⁴ Dan Bulley "'Foreign" Terror? Resisting/Responding to the London Bombings' in Angharad Closs Stephens and Nick Vaughan-Williams (eds.) 'Terrorism and the Politics of Response' (Routledge, 2008), 89.

⁵⁰⁵ *Ibid* 86.

⁵⁰⁶ *Ibid*.

security'.⁵⁰⁷ This sort of behaviour is used against foreign terrorist suspects because the courts have held it illegal to detain these suspects indefinitely (the *Belmarsh* case). When taking this point and considering the perceived threat or problems multiculturalism and cultural relativism can create in negotiating assurances, the UK government runs the risk of being viewed as racist and xenophobic (Bulley, 2008). Furthermore, activities of this nature may contribute to radicalisation, a concern seen in former measures such as s44 and the control order regime.

Those at risk of radicalisation are risks themselves (Jabri, 2008). If a foreign terrorist suspect, such as Abu Qatada, is successfully deported the UK loses any jurisdiction and control over the risk that individual poses. The inability to manage or control the terrorist threats by suspects falls outside of the intention of the CONTEST strategy. Edwards and Gomis (2011) discussed the five main objectives of the CONTEST strategy and recognised that the UK strategy was to address those risks seen to be a root cause or contributing factor to radicalisation. Yet it may be argued that seeking deportation of foreign nationals may be a factor creating ideologies which indoctrinate others to be radicalised, which does not support the UK's strategy. Whilst it may be politically unpalatable or unpopular with the media or public, if the threat posed by foreign nationals is greater whilst abroad, it would surely be better in the management of that risk to keep them under surveillance and control in the UK?

CONCLUSION

Unlike the government's earlier attempts to deal with the threat posed by foreign terrorist suspects (ie indefinite detention without trial), the system of deportation has provided an acceptable alternative. The use of immigration law and the immigration system, rather than adapting the criminal justice system to manage counter-terrorism (Roach, 2011) demonstrates the wide approach taken by the UK government. Various commentators suggest that the government has gone down this route as a consequence of the *Belmarsh* case (Hallo de Wolf and Watson, 2009). The immigration processes are an accepted and ordinary system used by the UK; however, the UK government has adapted an ordinary process to create a unique

⁵⁰⁷ Vivienne Jabri 'Security, Multiculturalism, and the Cosmopolis' in Closs Stephens and Vaughan-Williams (fn 504) 47.

counter-terrorism immigration system, supporting the argument that a counter-terrorism justice system has been developed to replace pre-existing systems. As seen with S44 and Control Orders, the process of deportation operates on a restricted knowledge basis which supports the findings of Chapter's Two and Three, namely that the extraordinary measures created to empower the executive achieve securitization which if not challenged or questioned can become normalized. The deportation process however has become acceptable and normalized, likewise has the use of assurances which means that one is unable to legally challenge the system itself because it is an acceptable practice. However, one may challenge the decision-making process and conclusions reached, particularly the negotiated assurances.

The DWA measure has primarily focused on Article 3, although the legal challenges of Abu Qatada demonstrate Article 6 is also an area of consideration. The importance of alleging that a human right would be breached is to establish that there is a 'real risk' of that breach under Article 3 or to suffer a flagrant denial of justice contrary to Article 6. The contracting states are then imposed with a higher burden to prove that the agreed assurances between them remove such risks. This process of reversed burden is substantially different when compared to the other measures previously discussed in Chapters Two and Three. The case of Abu Qatada raises issues regarding the UK strategy to counter-terrorism; the CONTEST strategy, the UK aims to attain greater control and management of the risks posed by terrorists. Some measures have been held incompatible with human rights, either because they are controversial or unworkable; once enforced DWA does not allow the government to have control or management of a risk. As discussed in Chapter Two and Three, S44 stop and search and control orders – as well as TPIMs – provide the executive with the ability to control and manage the terrorist threat; the control order regime empowered the executive to impose more stringent obligations and restrictions on a person's day-to-day life. Measures such as these were expected to support the UK in its endeavour to prosecute terrorists and thereby neutralising the threat they posed, however deportation of terrorist suspects does not enable the UK to manage or control them. The deportation of a suspect negates the UK's jurisdiction over that individual, which may result in the potential loss of vital intelligence of a terrorist network. This in turn means that the UK is unable to explore the wider network or identify other terrorist cells and networks, either domestically or internationally. Discussion regarding terrorist networks is considered in greater detail in Chapter Five.

Edwards and Gomis (2011) compiled twelve case studies of terrorists and terrorist suspects in the UK and found that in nine the internet contributed to the terrorist acts, whether by indoctrination, research, communication or to spread terrorist ideology. At the introduction of this chapter Lord MacDonald was quoted as supporting the use of DWA, believing it should be expanded upon (MacDonald Report, 2011), whilst simultaneously believing more should be done to detect and prosecute:

'Where people are involved in terrorist activity, they must be detected and, wherever possible, prosecuted and locked up. The Review rightly recognises this to be a primary purposes of public policy, so that any legislative scheme that appears to impede this important aim needs the most careful scrutiny, in order to determine whether, nevertheless, it may be justified on any other grounds.'⁵⁰⁸

By deporting a terrorist suspect it becomes increasingly difficult to detect and therefore prosecute other terrorists; as explained throughout this chapter, once deported the UK has no jurisdiction over the deportee, removing its ability to control and manage them as a threat. This means that the suspect could have access to various means which could spread terrorist ideology and radicalise vulnerable people which the UK would have no control over. This contradicts the 'primary purpose of public policy' as mentioned by Lord MacDonald above. This is a risk that this thesis argues is possible under this particular counter-terrorism measures enforced by the UK government.

Deportation forms part of the UK's preventative approach within its strategy; risk society thinkers, such as Dillon, Agamben and Edkins, view this approach by government as a way of either 'governing terror' or using 'sovereign power' (Amoore and de Goede, 2008). When addressing arguments relating to the SIAC process and the 'suspects' rights during the course of those hearings, there are criticisms over the use of special advocates and closed hearings; for an effective and fair trial there needs to be open justice, an issue discussed at length in Chapter Three. Crowther (2010) argues for the removal of closed hearings, easier access to expert witnesses that support the suspects' case and an improved system of communication between the appointed special advocate and suspect. Compared to control orders and the risks

⁵⁰⁸ MacDonald Report (fn 23) 9:1.

faced by a controlee, those suspects deported could face ill-treatment or be subject to an unfair trial that is based on evidence obtained by torture to which they have no remedy of rebuttal; it may be argued that there is more to lose for someone not convicted for any terrorist offence.

Alternatively, the government should consider counter-terrorism measures that are part of the ordinary legal system, but enable the state to control and manage those that pose a genuine terrorist threat. With this in mind, it is important to remember Abu Qatada has never been convicted of any criminal offence in the UK. If he truly was a risk to the UK, would alternative measures such as TPIMS provide the government sufficient control and management of those risks? Measures which enable him to interact with others in a manner that would allow intelligence-gathering could then be used to detect and prosecute other terrorists, an approach that this thesis would recommend be adopted. Chapter Five will consider whether TPIMs can provide such opportunities and support the UK's CONTEST strategy in detecting and prosecuting terrorists in this manner.

From the history of measures taken by the UK government post-9/11, there has been a clear on-going fight between the state and human rights. The relationship that both of these factors have with risk assessment is important and visible. Whilst the executive argue for the proportion of national security by introducing measures empowering the government to act pre-emptively and preventatively, such measures have a negative impact upon the suspect and wider community. As explained in Chapter Two, Zedner (2007b) argued that judicial interference would result in further restrictions being applied by the government, following the *Belmarsh* case control orders were introduced and DWA were utilised to control the foreign terrorist suspects. This steady progressive approach undertaken by government to establish and normalize its securitization agenda was further seen when the then Home Secretary expressed her intention to make it harder for deportees to challenge the executive's decision to deport; similarly, make it harder for the courts to rule against the decision or the contents of the DWA.

A similar risk shared between DWA, Control Orders and S44, which is discussed earlier in this thesis, is the risk of ‘unintelligibility’ (Berks, 2010). As Vlcek (2006) argues, this risk comes into play when a person is placed under restraint and has no means to recover their situation. For suspects facing deportation they face this risk because:

- (i) they are unable to challenge the evidence heard in closed hearings due to the ‘national security concerns’;
- (ii) they play no part in the negotiation of the assurances to protect their rights;
- (iii) if deported, they have no available right to remedy the situation if the receiving state fails to adhere to the terms of the assurances; and
- (iv) being labelled as a ‘terrorist suspect’ and facing deportation to a country with a poor human rights record, could mean the individual is unable to re-establish their position or status in society.

On the second point, one way of tackling the risk of unintelligibility was considered by Human Rights Watch (2005)⁵⁰⁹ reporting on a number of points that should be adopted in the deportation process, allowing the deportee an opportunity to challenge their position:

- (i) The process of deporting and the return should be challenged prior to the suspect actually being deported;
- (ii) All matters should be before an independent and impartial tribunal. For the government this comes from the existence of SIAC; similar tribunals have been praised (*Chahal* case: 131; Airkens, 2008);
- (iii) There should be the right to an appeal which suspends the deportation of a suspect;
- (iv) The suspect can challenge the reliability of the assurances provided as well as the terms of the assurances; and
- (v) Adequate post-return monitoring arrangements should be in place. It should not be sufficient for the court to believe that if "...no contact occurs, it will be obvious that something has gone wrong"⁵¹⁰ (XX case).

⁵⁰⁹ Human Rights Watch 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture' (April 2005) 17(4): D, 80 <<http://www.hrw.org/sites/default/files/reports/eca0405.pdf>> accessed 29th October 2012.

⁵¹⁰ XX v SSHD (fn 492) [21].

As the risks which a deportee truly face if deported are uncertain and are therefore incalculable, for the courts and SIAC, this is problematic for government. For the courts, being unable to guarantee that the 'real risk' faced by the deportee has been removed, the strict obligations under Article 3 make it impossible to deport. As Ruddock (2003) described the problem the UK government faces:

[W]e live in a world where we must accept the costs associated with protecting ourselves from terrorism. There will always be a trade-off between national security and individual rights. The task of government is to recognize these trade-offs and preserve our security without compromising basic rights and liberties.⁵¹¹

Unlike the other counter-terrorism measures that this thesis examines, DWA has an underlying sense of morality when considering potential ECHR breaches. The argument of morality comes from the non-derogable nature of Article 3 and principles encapsulated within Article 6. As Lord Justice Neuberger's dissenting judgment in *A (No 2)* said: '...even by adopting the fruits of torture, a democratic State is weakening its case against terrorists, by adopting their methods, thereby losing the moral high ground an open democratic society enjoys.'⁵¹²

It is for this thesis to consider whether the loss of morality in the name of national security by adopting counter-terrorism measures, such as DWA, is an effective measure which supports the UK strategy. Some commentators, such as Lord Goldsmith QC and the MacDonald Report (2011), support the use of deportation when it is not possible to achieve the balance or aim of the UK's strategy, namely detection and prosecution (Dershowitz, 2006). The loss of jurisdictional control and management of a suspect by deporting them does not deal with the threat posed by the suspect and questions the UK's stance on torture and the use of questionable evidence in legal proceedings. These are some of the risks the UK will encounter by continuing to adopt DWA, as Roach (2011) argued that deporting suspects can be seen as "exporting terrorism"; an opinion expressed by the Newton Committee.⁵¹³ It has

⁵¹¹ Philip Ruddock 'The Commonwealth Response to September 11: The Rule of Law and National Security' Speech delivered at the National Forum in the War on Terrorism and the Rule of Law, New South Wales Parliament House (10th November 2003).

⁵¹² Jim Duffy 'Abu Qatada Preventing a Flagrant Denial of Justice', Human Rights Blog One Crown Office Row (13th November 2012) <<http://ukhumanrightsblog.com/2012/11/13/abu-qatada-preventing-a-flagrant-denial-of-justice/>> accessed: 25th January 2013.

⁵¹³ Privy Counsellor Review Committee (fn 216) 138.

been possible for the UK to deport terrorist suspects to countries without the need for assurances, but there remains the need for this 'safeguard' with other countries. Whilst this thesis does not advocate the removal of the entire system, it does argue against its use when assurances are needed to negotiate the protections, particularly when the deportee could be better managed and controlled from within the UK so that further intelligence may be gathered.

CHAPTER FIVE

TERRORISM PREVENTION AND INVESTIGATIVE MEASURES AS A REPLACEMENT FOR CONTROL ORDERS; THE ON-GOING HUMAN RIGHTS ISSUES AND RISK IMPLICATIONS

'Our approach will combine tough, targeted restrictions under the new Terrorism Prevention and Investigation Measures with significantly increased resources for covert surveillance and investigation, new measures to support prosecutions... [t]he TPIMs package gives us the public protection measures we need, combined with increased resources for the police and Security Service, which are aimed at producing more evidence for use in possible prosecutions.'⁵¹⁴

- Theresa May MP, the former Home Secretary

INTRODUCTION

In this chapter will continue the discussions of the previous chapters to assess the UK's counter-terrorism measures post-9/11, specifically Terrorism Prevention and Investigation Measure scheme ('TPIMs') and Enhanced Terrorism Prevention and Investigation Measure scheme ('ETPIMs'), as replacements of the control order regime (see Chapter Three). By assessing the on-going issues with human rights and relevance of risk assessment, this

⁵¹⁴ Home Office 'Terrorism: Home Secretary's CONTEST speech' (12th July 2011d) <<https://www.gov.uk/government/speeches/terrorism-home-secretarys-contest-speech>> accessed 29th May 2014.

chapter will review whether TPIMs and ETPIMs provide a re-balance between national security and human rights, which control orders did not achieve. By assessing whether some or all of the controversies of the control order regime have been remedied and made proportionate by these new measures, it will be possible to determine whether they provide an effective way of countering terrorism and support to the UK's Strategy. This chapter is expected to demonstrate that measures such as these, which are more closely aligned to the criminal justice system, continue to support a preventative approach enabling securitization by the government to become normalized.

In the 2010 general election the first UK coalition government was formed since the Second World War, between the Conservative Party and Liberal Democrats. Both parties made election promises to review and consider the counter-terrorism powers available in the UK. In the MacDonald Report 2011 support was given to the review of UK Counter-Terrorism and Security Powers (the 'Security Review, 2011').⁵¹⁵ From the report and review, the control order regime was not believed to be working as the former UK Labour government had hoped. Lord Carlile QC (2010) described the former regime as a system that remained 'necessary' to deal with suspects that present a "considerable risk to national security and conventional prosecution is not realistic."⁵¹⁶ Despite Lord Carlile's view, as explained earlier in this thesis, this was the beginning of the end for control orders.

The findings of the MacDonald Report (2011) and Security Review (2011) recommended the repeal of the former regime. As a replacement and in keeping with political promises made at the 2010 general election, the coalition government introduced the Terrorism Prevention and Investigation Measures Bill 2011 (TPIMB 2011), which was later enacted and brought about the TPIMs. Similarly, the government later introduced ETPIMs implemented by the Enhanced Terrorism Prevention and Investigation Measures Bill 2011. The introduction of TPIMs was initially described as being a "cautious rebalancing in favour of liberty".⁵¹⁷

⁵¹⁵ Home Office (fn334).

⁵¹⁶ Lord Carlile QC of Berriew 'Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (1st February 2010) <<http://www.statewatch.org/news/2010/feb/uk-carlile-5th-report-on-terr-act-2005.pdf>> accessed 6th June 2014, 1.

⁵¹⁷ Helen Fenwick giving evidence before the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (24th October 2012b) <<http://www.parliament.uk/documents/joint->

Unlike the preceding regime was described as a ‘temporary measure’ (Fenwick, 2013; Walker, 2013), under which 52 suspects were made subject to obligations during its enforcement from 2005 until 2011 (Anderson QC, 2013); TPIMs may be viewed as a long-term measure (Wood, 2014). This Chapter will explain on what grounds TPIMs are believed to provide a re-balance between national security and human rights, re-focusing on prosecuting terrorist suspects (MacDonald Report, 2011), because doing so is an "institutional self-interest".⁵¹⁸ Since coming into force in January 2012 little data and information is widely available; however, the scheme was criticised for being a re-brand of the former regime, meaning the discussions in Chapter Three remain relevant. It is for this reason TPIMs would be viewed as an 'instrument of securitization' Balzacq (2008: 79).

Despite the re-balance TPIMs is believed to provide, this Chapter will show that their resemblance to the former regime means TPIMs as executive orders still do not give suspects the benefit of a trial and therefore contravene basic criminal justice values; values protected under Articles 5 and 6 ECHR. Similar to the discussion in Chapter Three, TPIMs and ETPIMs will be shown to be similar to the use of internment because they deprive suspects of their liberty due to the absence of any charge, trial, conviction for any criminal wrongdoing (McSherry et al, 2009; de Londras, 2011: 549; Zedner, 2014); they provide a coercive threat of criminal proceedings for non-compliance with obligations imposed upon their liberty. This reflects the change in counter-terrorism law and policy post-9/11, a move towards reliance on risk and uncertainty rather than guilt (de Londras, 2011: 549; Zedner, 2014). In terms of a risk-based process the control order regime provided a typical example of ‘securitization’ (Bright, 2012), and whilst the implementation of TPIMs may be viewed as representing a movement towards ‘desecuritization’, it nevertheless is securitization. As a consequence of this, this chapter will identify elements of risk which explain that through securitization in counter-terrorism measures such as TPIMs there is a ‘de-humanization’ which causes risks of social isolation and may give rise to opportunities of radicalisation.

[committees/Draft%20ETPIMS%20Bill/HC%20495%20iii%2024%20October%202012%20Corrected.pdf](#)> accessed 19th December 2012.

⁵¹⁸ Joint Committee on Human Rights (fn 81).

Through the comparison and assessment of the control order regime with TPIMs, it will be contended that as counter-terror law becomes increasingly politically based and moves away from the rule of law or Criminal Justice Model, it tends to be strategically misguided. The TPIMs has been in force for a few years and received criticism in the earlier years; Yvette Cooper MP, the Shadow Home Secretary, described it as 'a political fudge',⁵¹⁹ whilst Liberty labelled TPIMs as 'control orders lite'.⁵²⁰ The TPIMs will be shown to be a lighter version of the previous regime, although its counterpart scheme, the ETPIMs which operates in a similar manner to the former regime, will be identified as a scheme which returns to the practices seen previously save that it is restricted to unspecified emergency circumstances. In comparison with other counter-terrorism measures considered in the previous chapters, this chapter will show that ETPIMs replicate the same risks as control orders, whilst TPIMs create similar risks and harm to the UK through the alienation and radicalisation of suspects which could cause a backlash of increased terrorist activity (Lafree et al, 2009;⁵²¹ de Londras, 2011: 549). Ultimately this discussion will lead to discussions in Chapter Six which examine the effectiveness of UK pre-emptive and preventative counter-terrorism measures post-9/11, and whether they support the UK Strategy 2011. It will consider whether government "re-balancing" improves protections to suspects and the public.

The discussion of TPIMs will provide Chapter Six with evidence to argue that counter-terrorism measures used to control and manage terrorist suspects, who apparently cannot be prosecuted (or deported), has counter-productive effects. Although it is recognised by some, such as Middleton (2011a; 2011b), that terrorist suspects cannot be prosecuted for various reasons, those that were subject to a control order and now a TPIM are highly unlikely to ever be prosecuted because the Security Services and government have cut off the 'blood supply' to gather evidence for them to do so. This will support the final conclusions in Chapter Six; pre-emptive and preventative measures, such as TPIMs and ETPIMs, stifle the progress of

⁵¹⁹ House of Commons 'Counter-terrorism Review' 2010-2012 (Hansard) 26th January 2011 522-106: 306-327, 310.

⁵²⁰ Liberty 'Progress on Stop and Search But Control Order by Any Other Name' (26th January 2011) <<http://www.liberty-human-rights.org.uk/media/press/2011/progress-on-stop-and-search-but-control-orders-by-any-ot.php>> accessed 5th April 2011.

⁵²¹ Gary Lafree, Laura Dugan and Raven Korte 'The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models' 2009 *Criminology* 47(1): 17-45. Also see Fiona de Londras 'Can Counter-Terrorist Internment Ever be Legitimate?' 2011 *Human Rights Quarterly* (August) 33(3): 593-619.

obtaining a conviction against the suspect and is therefore an ineffective way of countering terrorism.

This chapter will establish that TPIMs is aimed at controlling and managing the uncertain threat allegedly posed by a terrorist suspect. Similar to control orders, it operates outside of the criminal justice system; it continues to use special advocates; it relies on restriction of the information that is disclosed to terrorist suspects; it imposes obligations that restrict a person's ordinary day to day life; it arguably breaches Articles 5 and 6 ECHR. Glees (2012) described TPIMs as being "more or less a reversion to the old control orders."⁵²² It will be shown that despite the government's "tweaks around the edges".⁵²³ Ultimately, TPIMs and ETPIMs will be shown to raise the same issues as the former regime and demonstrate the government's continued allegiance to the use of "executive interference without a criminal trial",⁵²⁴ despite the government's attempt to rebalance security powers in favour of civil liberties. In Chapter Three it was argued that the Bail Act 1976 may be used as an alternative to the former regime, this chapter will argue that for the purposes of re-balancing human rights and the need to gather intelligence and evidence, no non-trial-based measure should be invoked to control and manage terrorist suspects. This argument will support the 'Criminal Justice Model and Human Rights Approach' which this thesis believes should be taken, as will be explained in Chapter Six.

FROM CONTROL ORDERS TO TPIMS

As discussed in Chapter Three, the former regime was a controversial executive counter-terrorism measure which had been implemented following the *Belmarsh* case.⁵²⁵ It is important to recall that the creation of the former regime was the development of the government's response to judicial interference (Zedner, 2007b). Following numerous legal challenges in the domestic courts, which have been discussed at length in Chapter Three, the

⁵²² Glees (fn 348).

⁵²³ Sophie Farthing giving evidence before the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (24th October 2012) <<http://www.parliament.uk/documents/joint-committees/Draft%20ETPIMS%20Bill/HC%20495%20iii%2024%20October%202012%20Corrected.pdf>> accessed 19th December 2012.

⁵²⁴ Fenwick (fn 517).

⁵²⁵ *A and Others v SSHD* (fn 24).

regime survived and was adapted to ‘fit’ the judgments of the courts. But the former regime has not been tested in the ECtHR as explained to the Joint Committee at Parliament by Fenwick (2012b), '[t]herefore it does not have a clean bill of health at Strasbourg. In a sense it has a clean bill of health domestically but not at Strasbourg.'⁵²⁶

The longest period of time a suspect was subjected to a control order was in excess of 55 months, whilst the shortest period of time was two months (Anderson QC, 2013: 40). It was confirmed in the Anderson QC Review (2013) that a total of 52 suspects were subjected to a control order during the lifetime of the regime; of the 52 control orders, the time individual suspects spent under the regime is outlined in Table G below, of these 45 were revoked, quashed or expired, nine remained when the regime came to an end, however the table does not include those that absconded.

0-1 years	1-2 years	2-3 years	3-4 years	4-5 years
16	14	8	4	3

Table G: Time periods when suspects were placed under a control order (Anderson QC, 2013: 40)

This is particularly relevant for the discussions of the time limits under the new scheme (below). The former regime was widely criticised for the duration of time suspects were placed under a control order, but mainly for the obligations imposed against them; which at the time were 'tailored to meet the threat posed by the particular suspect.'⁵²⁷ The MacDonald Report 2011 criticised the former regime and held that the obligations themselves were 'intrinsically hostile to evidence gathering'⁵²⁸ and therefore naturally made it harder to prosecute those terrorist suspects. This was relevant because prosecution of terrorist suspects was the ultimate goal of the UK Strategy 2011, as per CONTEST⁵²⁹ (Middleton, 2011b). As the former regime inhibited the ability to secure future prosecutions, the MacDonald Report 2011 recommended TPIMs in order to '...protect the public but will be less intrusive, more

⁵²⁶ Fenwick (fn 517).

⁵²⁷ MacDonald (fn 227) 604.

⁵²⁸ MacDonald Report (fn 23) 21.

⁵²⁹ HM Government 'Pursue, Prevent, protect, prepare: The United Kingdom's Strategy for Countering International Terrorism' (March 2009) Cm 7547.

clearly and tightly defined and more comparable to restrictions imposed under other powers....⁵³⁰

Walker (2010a) explained that whilst the regime was considered “odious” it remained an ‘imperative [means] of responding to [the] anticipatory risk of terrorism....’⁵³¹ As Watkins (2008) explains, ‘control orders are flawed but [it is] equally clear that some controlling mechanism is required on potentially dangerous individuals’.⁵³² It was intended that TPIMs would help balance and bridge the gap between sensitive security issues and the difficulties when prosecution was not possible, without compromising sensitive intelligence or intelligence gathering techniques (Security Review, 2011: 37). TPIMs were also believed to be the solution for providing early intervention in order to protect the public when there was not a ‘realistic prospect of conviction’.⁵³³ Despite this, TPIMs just like control orders are ‘extraordinary schemes of executive power, which despite the gravity of the measures at stake, stand outside of and are largely independent of the criminal justice system’.⁵³⁴ Despite this criticism, Anderson QC described the government’s introduction of TPIMs as the government injecting ‘a greater degree of liberalism into its counter-terrorism policy’.⁵³⁵

Enhanced Terrorism Prevention and Investigation Measure scheme: a new emergency measure

The Security Review (2011) identified that there might be exceptional circumstances when the government would need to seek Parliamentary approval for ‘more extensive and intrusive measures than TPIMs’.⁵³⁶ Anderson QC remarked that some would prefer to use other legislative powers, such as the Civil Contingencies Act 2004 (Anderson QC, 2013); although

⁵³⁰ MacDonald Report (fn 528).

⁵³¹ Clive Walker ‘The Threat of Terrorism and the Fate of Control Orders’ 2010a Public Law (January) 4-17, 7.

⁵³² Los Watkins ‘Control Orders: The Beginning of the End?’ Undated, 7 and 8 <<http://www.inter-disciplinary.net/wp-content/uploads/2010/02/watkinspaper.pdf>> accessed 12th April 2011.

⁵³³ Ben Middleton ‘Rebalancing, Reviewing or Rebranding the Treatment of terrorist Suspects: The Counter-Terrorism Review 2011’ 2011b Journal of Criminal Law 75(3): 225-248, 227. Also see: HM Government (fn 529).

⁵³⁴ House of Lords Select Committee on the Constitution ‘Terrorism Prevention and Investigation Measures Bill’ 2010-2012 Nineteenth Report (15th September 2011) HL 198, 5.

⁵³⁵ Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill’ 2012-2013 First Report (27th November 2012) HC 495/HL 70.

⁵³⁶ Anderson QC (fn 47).

Fenwick (2012b) evidenced to a Parliamentary Joint Committee that this option has been viewed as being contrary to the government's aim of introducing more liberal policies (Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 2012-2013). The MacDonald Report (2011) recognised that 'there may be exceptional circumstances where it could be necessary for the Government to seek parliamentary approval for additional restrictive measures';⁵³⁷ hence why the government drafted and published draft primary legislation known as the ETPIMB 2011, accompanying the TPIMA 2011. Lord Lloyd understood that having such a mechanism provided advantages: '[t]he existence of a fall-back Bill containing the former powers may help diminish concerns, at a time of continued uncertainty, about initiatives to liberalise anti-terrorism laws, and so provide the impetus for such liberalisation to take place.'⁵³⁸

The scrutiny of ETPIMB 2011 in Parliament has caused controversy, it was considered 'necessary to do so by reason of urgency'⁵³⁹ and regarded as being similar to the Henry VIII clause (Wagner, 2011). Whilst the Bill has not been enacted, the TPIMA 2011 provides limited provision for the Secretary of State to temporarily enforce ETPIMs in accordance with s26; only at times the Secretary of State 'considers that it is necessary to do so by any reason of urgency' (s26(1) TPIMA 2011). ETPIMs cannot be enforced until the Bill receives the Royal Assent, which means that in the interim period until that happens, s26 TPIMA 2011 will be available to enforce temporary ETPIMs, including times when Parliament is dissolved or in recess. The measure would be activated at times of exceptional circumstance, effectively acting as an emergency power; as it has not been activated discussion of ETPIMs can only be academic. ETPIMs is considered a replica of the former regime, Glees (2012)⁵⁴⁰ explained that "...the 'E' aspect of this – the enhanced aspect – was a return, effectively, to control orders..."⁵⁴¹

⁵³⁷ Home Office (2011a) 43: 27.

⁵³⁸ Ibid.

⁵³⁹ Adam Wagner 'Anti-terrorism powers for a rainy day' 2011 UK Human Rights Blog One Crown Row <<http://www.ukhumanrightsblog.com/2011/09/04/anti-terrorism-powers-for-a-rainy-day/>> accessed: 12th May 2012.

⁵⁴⁰ Glees (fn 348).

⁵⁴¹ Ibid.

Whilst TPIMs are considered to introduce 'a greater degree of liberalism into its counter-terrorism policy',⁵⁴² ETPIMs by comparison return to the use of stringent measures; stricter obligations are available including, the relocation requirement and longer house detention periods. Both TPIMs and ETPIMs rely upon the 'control order model' (Fenwick, 2013) by the design with both measures taking a preventative approach. As mentioned, ETPIMs would only be used in exceptional circumstances, however those circumstances are not made clear under the Bill. This means that when a suspect is removed from a TPIM, they may become subject to an ETPIM so long as the evidence of terrorist related-activity relied upon to impose the TPIM could be shown to the civil standard. Both TPIMs and ETPIMs support the normalization of preventative non-trial-based counter-terrorism measures (Zedner, 2007b; Ruddock, 2008; Walker, 2011; Fenwick, 2013), which for reasons discussed in previous chapters is a serious risk.

What are the differences between TPIMs and Control Orders?

Putting aside the name change of the two measures, the obligations imposed under the former regime were imposed based upon the 'threat that the individual is thought to pose'⁵⁴³ and not for the purposes of supporting an investigation or for purposes of prosecution (Zedner, 2014). Although both are similar in format, TPIMs were to bring about an 'end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal daily life.'⁵⁴⁴ David Anderson QC (2013) considered TPIMs a 'significant rolling back of control orders'.⁵⁴⁵ TPIMs, like the former regime, imposed a coercive requirement on suspects so that failure to comply with imposed obligations amounted to a criminal offence (s23 TPIMA 2011). It was hoped that TPIMs would prevent suspects from engaging in terrorist related activity by "curbing their liberty",⁵⁴⁶ with the intention of facilitating the process of criminal prosecution (Fenwick, 2011).

⁵⁴² Joint Committee on the Draft ETPIM Bill (fn 535).

⁵⁴³ Lucinda Zedner 'Terrorizing Criminal Law' 2014 Criminal Law and Philosophy (January) 8(1): 99-121.

⁵⁴⁴ Joint Committee on the Draft ETPIM Bill (fn 535).

⁵⁴⁵ Ibid.

⁵⁴⁶ Helen Fenwick 'Preventative anti-terrorist strategies in the UK and ECHR: Control Orders, TPIMs and the role of technology' 2011 International Review of Law, Computers & Technology (November) 25(3): 129 – 141, 131.

Of the available obligations, TPIMs have replaced the curfew restriction with an ‘overnight residence requirement’ which will be supported by electronic tagging. It is recognition by Middleton (2011b) that TPIMs provide no limit to the number of hours a suspect may be ordered to remain indoors, although it may be naïve to think that this would be clarified in the legislation itself. This relates to one’s liberty under Article 5 and it was confirmed, through case law, that the maximum period of time a person may be under a curfew is 16 hours (*Secretary of State for the Home Department v JJ*), although the court deemed that it was necessary to assess the effect of other obligations to determine any breach of Article 5. As seen in discussions in Chapter Three, the domestic courts would support the counter-terrorism measure itself but may find a particular obligation to breach the ECHR; alterations would be made by government to make the measure compliant (se *JJ* case and *AP* case).

David Anderson QC reviewed the former regime and assessed TPIMs (‘2012 Review’).⁵⁴⁷ It was confirmed that in 2007 the Security Services (Mi5) alleged that at least 2,000 individuals had been identified that posed a threat to national security and public safety (2012: 29).⁵⁴⁸ Despite this, only 256 individuals were charged under terrorism legislation, with 157 being convicted (Home Office, 2010-2011).⁵⁴⁹ As mentioned earlier, only 52 people were placed under a control order (2012 Review, 2012: 4), of which:

- 24 were British citizens; and
- 28 were foreign nationals (2012: 30).

By the end of the regime, four of the nine controlees had been subject to a control order for more than 2-years and once TPIMs became enforceable, all nine were placed onto a TPIM. Given that the nine suspects would be transferred from a control order to a TPIM, the Joint Committee on Human Rights (2010-2012a: 11 and 12) recommended to Parliament that the suspects should have the obligations lifted; Parliament rejected this proposal. With the majority of suspects being subject to a control order for at least 2 years, when compared to the ‘identified 2,000 suspects’, it is apparent that a low number of suspects have been

⁵⁴⁷ Anderson QC (fn 47).

⁵⁴⁸ Ibid referring to Jonathan Evans, Director General of MI5, Address to the Society of Editors (5th November 2007) <<http://www.mi5.gov.uk/output/intelligence-counter-terrorism-and-trust.html>>.

⁵⁴⁹ Home Office 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches' 2010-2011 (13th October 2011) Home Office Statistical Bulletin HOSB 15/11 <http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116740/hosb1511> accessed 1st June 2014.

subjected to these counter-terrorism measures or prosecution. This raises concerns over the use of intelligence as a trigger for counter-terrorism measures, which will be considered later in this chapter. The former regime required the Home Secretary to renew the measure, thereby report to Parliament, on an annual basis (pursuant to s2(4) PTA 2005); TPIMs require the Secretary of State to report to Parliament as soon as is reasonably practicable on a quarterly basis (pursuant to s19(1) TPIMA 2012). Although unlike the former regime, TPIMs are not subject to annual renewal. The then Home Secretary, Theresa May MP, was able to provide the following statistical data to Parliament of those subject to a TPIM for the first two years of TPIMs being enforceable:

	<u>31st May 2013</u> ⁵⁵⁰	<u>28th February 2013</u> ⁵⁵¹	<u>30th November 2012</u> ⁵⁵²	<u>31st August 2012</u> ⁵⁵³	<u>31st May 2012</u> ⁵⁵⁴	<u>29th February 2012</u> ⁵⁵⁵
TPIM Notices in force as of this date	8	8	10	9	9	9 ⁵⁵⁶
TPIM notices in respect of British citizens	8	7	9	9	9	9
TPIM notices extended	1	6	N/A	0	N/A	N/A
TPIM notices revoked	1	1	N/A	0	N/A	N/A
TPIM notices expired	N/A	2	N/A	0	N/A	N/A
TPIM notices revived	1	1	N/A	0	N/A	N/A
Variations made to measures specified in TPIM notices	25	21	12	27	21	4
Applications to vary measures specified in TPIM notices refused	4	12	7	12	19	7

Table H: Active TPIMS between 1st March 2012 and 29th February 2013.

⁵⁵⁰ Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (1st March to 31st May 2013)' (13th June 2013a)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-1-march-2013-to-31-may-2013>> accessed 24th July 2013.

⁵⁵¹ Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (1st December 2012 to 28th February 2013)' (14th March 2013b)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-1-december-2012-to-28-february-2013>> accessed 24th July 2013.

⁵⁵² Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (1st September 2012 to 30th November 2012)' (6th December 2013c)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-1-september-to-30-november-2013>> accessed 1st June 2014.

⁵⁵³ Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (1st June 2012 to 31st August 2012)' (7th September 2012d)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-1-june-to-31-august-2012>> accessed 24th July 2013.

⁵⁵⁴ Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (1st March 2012 to 31st May 2012)' (19th June 2012c)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-1-march-to-31-may-2012>> accessed 24th July 2013.

⁵⁵⁵ Home Office 'Written Statement to Parliament: Terrorism Prevention and Investigation Measures (15th December 2012 to 29th February 2012)' (26th March 2012e)
<<https://www.gov.uk/government/speeches/terrorism-prevention-and-investigation-measures-15-december-2011-to-29-february-2012>> accessed 1st June 2014.

⁵⁵⁶ These are the original nine that were on a control order before being transferred and subjected to a TPIM.

There is an exhaustive list of available obligations under Schedule 1 TPIMA 2011, including: travel restrictions; overnight residence or curfew; telecommunication restrictions; association restrictions; work and studies restrictions; reporting requirements; and exclusion zones across the UK to name a few.⁵⁵⁷ The latter of these obligations means that the Secretary of State can exclude the suspect from going into certain parts of the UK, which will undoubtedly include Critical National Infrastructures such as the Houses of Parliament – such restrictions were also seen under the former regime. The obligation of relocating a terrorist suspect to another part of the country ended under TPIMs; however, the obligation has been reserved to ETPIMs which will be discussed later in this chapter. Under TPIMs one of the newest changes to the obligations is the relaxed use of telecommunications, these include access to the internet and use of mobile devices. It is anticipated that relaxing this obligation will have an impact on the evidence-gathering process undertaken by the security services. Academic discussion (Middleton, 2011b; MacDonald Report, 2011; Anderson QC Independent Review, 2013; Walker and Horne, 2012; Fenwick, 2011; 2013; Walker, 2013) and political debate (Joint Committee on Human Rights, 2012-2012b; Joint Committee on the Draft ETPIM Bill, 2012-2013) have identified the significant differences between the former regime and TPIMs and each will be discussed in turn:

- (1) The standard of proof being ‘reasonable belief’;
- (2) Relaxation on the use of telecommunications;
- (3) The removal of the relocation obligation under TPIMs, but its retention under ETPIMs;
- (4) The obligations imposed need to be proportionate;
- (5) Time limit for the enforcement of TPIMs and ETPIMs.

(i) *The standard of proof being ‘reasonable belief’*

The former regime had use of derogating and non-derogating control orders. The former had a standard of proof based on reasonable suspicion whilst the latter was based on the balance

⁵⁵⁷ Terrorism Prevention and Investigation Measures Act 2011, Schedule 1, Part 1 gives provisions for the following obligations: (1) Overnight residence measure; (2) Travel measure; (3) Exclusion measure; (4) Movement directions measure; (5) Financial services measure; (6) Property measure; (7) Electronic communication device measure; (8) Association measure; (9) Work or studies measure; (10) Reporting measure; (11) Photography measure; and (12) Monitoring measure: <http://www.legislation.gov.uk/ukpga/2011/23/schedule/1/enacted> (Last accessed 2nd June 2014).

of probabilities. The criticism here was that with either of them the standard of proof was less than the criminal standard, making the threshold an 'extremely low threshold'.⁵⁵⁸ The MacDonald Report (2011) supported the government's change from that set out under the former regime to TPIMs' new 'reasonable belief' standard. Lord Carlile QC (2011a) was of the opinion that the new standard of proof made a difference because it was a 'higher threshold'.⁵⁵⁹

TPIMs and ETPIMs may be imposed by the Home Secretary so long as Conditions A to E, as set out in s3(1)-(6) TPIMA 2011 and clause 2 ETPIMB 2011, are met and subject to review by the court (s9(2) TPIMA 2011):

- (i) Condition A provides the lower standard of 'reasonable belief';
- (ii) Condition B requires a 'new' terrorist activity, although Fenwick (2013) describes this as misleading because the imposition of a TPIM can be based on previous terrorist-related activity. The term 'new' is not an adjective that needs to be met for a suspect to be placed on an TPIM/ETPIM for the first time, but if placed upon either of these measures again, 'new' terrorist-related activity is expected to be shown;⁵⁶⁰
- (iii) Condition C prescribes the Secretary of State to reasonably consider it necessary to impose a TPIM 'for purposes connected with protecting members of the public from a risk of terrorism';
- (iv) Condition D requires that the Secretary of State to reasonably consider it necessary to impose TPIMs 'for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity'. It is important to note that Condition D dilutes the requirement seen under the control order regime requiring each obligation imposed to be necessary for the purposes of protecting the public from the risk of terrorism;

⁵⁵⁸ Joint Committee on Human Rights (fn 59) 59.

⁵⁵⁹ Lord Carlile QC of Berriew 'Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (3rd February 2011a) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97989/lord-carlile-sixth-report.pdf> accessed 6th June 2014. See also: Middleton (fn 533) 236.

⁵⁶⁰ Joint Committee on the Draft ETPIM Bill (fn 535) 42.

- (v) Condition E requires court permission to impose a TPIM or ETPIM, unless the Secretary of State deems it urgent – as pointed out by Fenwick (2013), this would normally be the case given the seriousness of terrorism.

Concern remains over the standard of proof to impose a TPIM, as identified by Middleton (2011b): the reasonable belief threshold is not very different from the former regime. Lord Brown in *R v Saik*⁵⁶¹ found that belief is viewed as being "[t]o suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so."⁵⁶² Middleton (2011b) finds that there has been a struggle in understanding or obtaining guidance as to the meaning of reasonable belief. With reference to *R v Forsyth*⁵⁶³ and *R v Griffiths*,⁵⁶⁴ Middleton argues that the standard falls between 'the standard of reasonable belief and the full civil standard of proof on the balance of probabilities.'⁵⁶⁵ In *Secretary of State for the Home Department v CC, CF*⁵⁶⁶ the TPIM standard of proof was confirmed to be higher in comparison to the former regime; this was reached when taking into account Law LJ from the *A and Others* case: 'Belief is a state of mind by which the person in question thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case'.⁵⁶⁷

The new standard of proof under TPIMs raises a few concerns, particularly in light of comments by Lord Brown, namely that to believe that 'it may be so'⁵⁶⁸ means that the government should be certain that the individual subject to a TPIM, is the person that may pose a threat to security and public safety. This obviously does not mean that the individual can be proved to pose a threat beyond reasonable doubt. There remains a risk that suspects are placed upon a TPIM based on a low standard of proof threshold, in this sense to remains fair to argue that there is no difference between TPIMs and the former regime. Lord Carlile QC (2011a) confirmed that the change in the standard would cause 'no material difference to the existing controlees'⁵⁶⁹ and went further to suggest that the basis on which the majority of

⁵⁶¹ *R v Saik* [2006] UKHL 18.

⁵⁶² *Ibid* [120].

⁵⁶³ *R v Forsyth* [1997] 2 Cr App R 299 [319].

⁵⁶⁴ *R v Griffiths* (1974) 60 Cr App R 14 [18].

⁵⁶⁵ Middleton (fn 533) 237.

⁵⁶⁶ *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin).

⁵⁶⁷ *Ibid* [229].

⁵⁶⁸ *R v Saik* (fn 562) [120].

⁵⁶⁹ Lord Carlile QC of Berriew (fn 559) 30.

the control orders were imposed would satisfy the civil standard of a balance of probabilities. One may then ask the question: why is the civil standard of proof not used? Middleton (2011b) explains that the balance of probabilities is flexible in its application and its application would depend upon the nature of each measure; in other words it would be judged on a case by case basis (McBride, 2009; Mirfield, 2009).

Farthing (2012) explained to the Joint Committee on the Draft ETPIM Bill, that there is no difference between the old and new standards because the remaining nine controlees were easily transferred onto a TPIM in 2012; she added that '[o]n a balance of probabilities, it might make a small amount of difference.'⁵⁷⁰ Whilst the balance of probabilities is a standard not seen under the TPIM, it is applied when the Secretary of State seeks to impose an ETPIM. Whilst Conditions B, C and E under the ETPIMB 2011 are similar to those set out in the TPIMA 2011, Condition A requires the Secretary of State to be satisfied on 'the balance of probabilities that the individual is, or has been, involved in terrorism-related activity'.⁵⁷¹ This is the same standard applied when enforcing the temporary ETPIM under s26 TPIMA 2011. The standard for ETPIMs is the same as non-derogating control orders, evidence that ETPIMs is an amalgamation of both non-derogating and derogating control orders.

Middleton (2011b) considers the balance of probabilities as a better standard of proof due to its fluidity when applied by the courts; furthermore, since it is applicable on a case-by-case basis, the courts are at liberty to set the threshold at a higher level when it is justified to do so (eg when a suspect faces the possible loss of their liberty or right to a fair trial). Despite this justification, Middleton cynically believes that the use of the reasonable belief for TPIMs is a tactical move by the government so that it may be sure it can manipulate the measure being imposed and its implementation once imposed (2011: 237); if this is true, then this is evidence of government seeking to utilise securitization for its own benefit. If the courts are given too much power to adjudicate on the imposition of control measures (eg indefinite detention without trial and control orders), the government is unable to guarantee complicity or deferential behaviour, as was arguably seen under the former regime (see Chapter Three). As Middleton (2011b) states: '[giving] the flexibility of the civil standard of proof, it might be

⁵⁷⁰ Farthing (fn 523).

⁵⁷¹ Clause 2(1) Enhanced Terrorism Prevention and Investigation Measures Bill 2011.

that the courts would decide that a higher standard of, close to beyond reasonable doubt, should be used in light of the nature of the TPIM; no doubt this would be extremely concerning to the government.⁵⁷² Although there was some judicial fightback towards the end of the former regime (see *AT v Secretary of State for the Home Department*,⁵⁷³ *AF v Secretary of State for the Home Department*⁵⁷⁴ and Chapter Three), the seriousness of terrorism caused domestic courts to be deferential towards government assertions as to the assessed risk posed by a suspect; viewing it as a political not a legal matter (the *Belmarsh* case per Lord Bingham). The change in the standard of proof does not appear to meet the criticism of Farthing (2012) and appears to show TPIMs being no more than 'tweaks around the edges'.⁵⁷⁵ The criticisms made by Middleton (2011b) for the government not to want a higher standard of proof is because it seeks to influence the process. It is for this reason alone that TPIMs require fully independent scrutiny by the courts.

(ii) *Relaxation on the use of telecommunications*

Relaxing the use of telecommunications as one of the available obligations under TPIMs, may enable the government to achieve its set purposes under the UK Strategy 2011; it may enable the gathering of more evidence against a suspect, identify further networks and material that may be viewed as radicalising, and prosecute. This decision to relax the use of telecommunications may be considered in the light of *R v Smith and Others*⁵⁷⁶ which was an appeal of a Sexual Offences Prevention Order ('SOPO's'), a preventative measure similar to control orders and TPIMs. The Court of Appeal considered SOPO's that had been made against four defendants for sexual offences. It was held that when making a SOPO its drafting and implementation should be necessary, the terms should not be oppressive and the order should be proportionate; this was found to be in accordance with *R v Mortimer*⁵⁷⁷. The Court of Appeal ruled against an internet ban for the sexual offenders on the basis that:

'It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement

⁵⁷² Middleton (fn 533) 237.

⁵⁷³ *AT v SSHD* (fn 290).

⁵⁷⁴ *AF v SSHD* (fn 20).

⁵⁷⁵ Farthing (fn 523).

⁵⁷⁶ *R v Smith and others* [2011] EWCA Crim 1772.

⁵⁷⁷ *R v Mortimer* [2010] EWCA Crim 1303.

of much employment. Before the creation of the internet, if a defendant kept books of pictures of child pornography it would not have occurred to anyone to ban him from possession of all printed material. The internet is a modern equivalent.⁵⁷⁸

This finding would also apply to terrorist suspects; Wagner (2012) discusses this as a human rights matter, which will be discussed later in this chapter. The internet is widely accepted as a mode of social media; the relaxing of the limits on use of telecommunication for terrorist suspects appears to have been widely welcomed by many (Middleton, 2011b; Fenwick, 2012; Glee, 2012). Many believe that modern terrorism is changing; recent behaviour indicates that 'solo-terrorism' is the new threat, as demonstrated by Andres Breivik (Cato Hemmingby, 2013), the Boston Marathon bombers⁵⁷⁹ and the Woolwich attack (Joshi, 2013).⁵⁸⁰ Irons (2008) considered the Joint Terrorism Analysis Centre ('JTAC') assessment of terrorism and identified a three-tier model (2005) of terrorists:

- (i) Tier one – are those individuals or networks thought to have a direct link with a terrorist organisation, such as al-Qaeda;
- (ii) Tier two – is described as individuals or networks that are loosely affiliated with terrorist organisations; and
- (iii) Tier three – is described as those individuals or networks that are inspired by a terrorist organisations ideology.

By lifting the restrictions on the use of telecommunications one may argue that it becomes easier to identify a wider network of terrorism or those individuals that would fall in any one of these aforementioned tiers. Under the former regime, a wider network would most likely have gone unnoticed or insufficient intelligence would have been gathered to detect terrorist related activities.

Edwards and Gomis (2011) compiled research for Chatham House of British terrorist profiles and attacks post-9/11 and examined twelve case studies. From the research they determined

⁵⁷⁸ R v Smith and others (fn 576) [20].

⁵⁷⁹ Boston Marathon bombings took place on the 15th April 2013 and the suspects identified for the bombing were Dzhokhar and Tamerlan Tsarnaev.

⁵⁸⁰ Sharad Joshi 'Woolwich Attack and the Changing Nature of Terrorism' 2013 Chatham House (24th May) <<http://www.chathamhouse.org/media/comment/view/191685>> accessed 24th May 2013.

that from nine cases the internet had contributed in some way to terrorist attacks 'whether for indoctrination, research, communication between attackers or to spread ideology'.⁵⁸¹ They confirmed that the internet had been used by seven of the case studies for purposes of indoctrination and became particularly important for communication/spreading terrorist ideology, particularly when a terrorist had no personal links with any terrorist network (Edwards and Gomis, 2011). Two examples of the internet being extensively used for terrorist activity is Isa Ibrahim and Roshonara Choudhry; the former was known for the Bristol suicide bombing in 2009, the latter stabbed Stephen Timms MP whilst holding a constituency surgery in 2010. Both terrorists watched radical Islamic preachers 'while not having any face-to-face contact with anyone holding radical views'.⁵⁸² With a relaxed use of telecommunications the existence of terrorist networks can be identified along with its members or other potential terrorist suspects.

Terrorist networks are best viewed under the main discussion point of 'degree centrality' (Irons, 2008).⁵⁸³ The degree centrality is made up of the 'in-degree centrality' and the 'out-degree centrality'; the former relates to incoming links and connections that an individual has, the latter refers to the outgoing links and connections a person has. This creates what Arquilla and Ronfeldt (1996)⁵⁸⁴ and Krebs (2002a)⁵⁸⁵ refer to as an 'all-channel' network' which forms part of their analysis of 'Netwar' (see Krebs, 2002a; 2002b). An example of this network is shown below in Diagram 2:

⁵⁸¹ Edwards and Gomis (fn 155).

⁵⁸² Ibid.

⁵⁸³ Larry R. Irons 'Recent Patterns of Terrorism Prevention in the United Kingdom' 2008 Homeland Security Affairs (January) 4(1) <www.hsaj.org>

⁵⁸⁴ John Arquilla and David F. Ronfeldt 'The Advent of Netwar' RAND Corporation (1st January 1996). Also see: Ibid.

⁵⁸⁵ Valdis E. Krebs 'Uncloaking Terrorist Networks' 2002a First Monday: Peer-Review Journal on the Internet (April 2002) 7(4). Also see: Irons (fn 583).

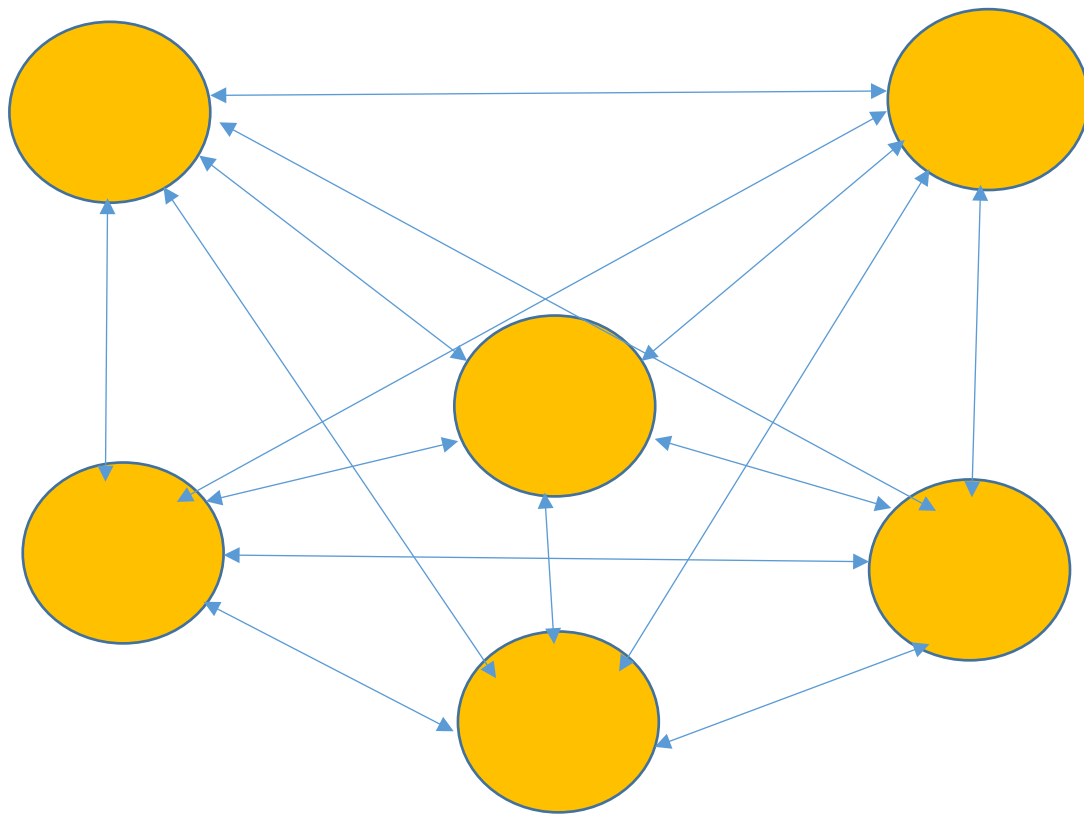
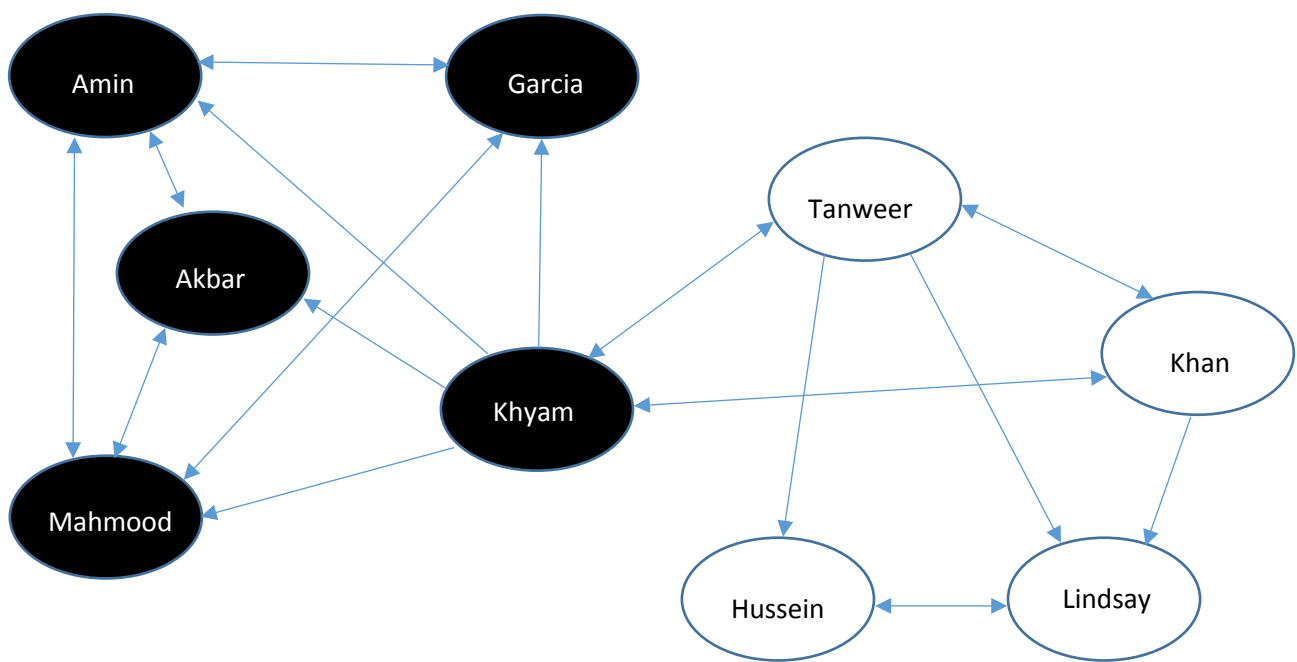


Diagram 2: Sample network (Irons, 2008: 8)

To explain this network and the applicability of degree centrality to TPIMs, reference is best made to those involved in the ‘fertiliser bomb plot’ of 2004 and those involved in the London 7/7 bombings. The fertiliser bomb plot of 2004 involved seven conspirators – five British, one American and one Canadian – each having links in Afghanistan and Pakistan; these conspirators were Salahuddin Amin, Jawad Akbhar, Anthony Garcia, Waheed Mahmood, Omar Khyam, Shehzad Tanweer and Mohammad Sidique Khan. Each of them were careful to avoid the use of mobile phones and emails; they were believed to regularly discard hard devices and mobile phone SIM cards (Edwards and Gomis, 2011). As Irons (2008) explains, there can be an overlap between in-degree and out-degree centrality when members are more connected than others, with those having higher out-degree centrality providing more influence; this is exemplified by Mohammad Sidique Khan and Shehzad Tanweer (2008: 9). This means that the network can then influence others who are involved in an in-degree centrality way, such as Germaine Lindsay and Hasib Hussein who were involved in the 7/7 bombings. This particular network is illustrated below in Diagram 3.



Fertiliser bomb plotters from 2004 (the network on the left).

London 7 July plotters (the network on the right).

Diagram 3: Example of the terrorist network between two known terrorist plots (Irons, 2008:8)

The link between the two terrorist plots is seen by Khyam of the Fertiliser bomb plot and Tanweer and Khan of the 7/7 bomb plot. Links of this nature are described as ‘betweenness centrality’ (Irons, 2008). Individuals that link networks or groups are considered the ‘bridge’, or ‘subnetwork’ between the groups (Cross and Parker, 2004;⁵⁸⁶ Irons, 2008). In relation to the illustrated network above in Diagram 2, Irons (2008) considers that Khyam most likely played a ‘liaison role rather than a broker role’,⁵⁸⁷ meaning that his participation had no bearing on the 7/7 bombings, but there nonetheless existed a link between the two groups. Irons (2008) agrees that this link required further investigation; imagine that Khyam had been placed on a control order and prevented from communicating with or associating with others in any way, the security services would have had greater difficulty in identifying Tanweer and Khan unless they had already done so. Ultimately the concern of the former regime is that it would cut off the ‘blood flow’ of terrorism, allowing for its detection to be

⁵⁸⁶ Rob Cross and Andrew Parker ‘The Hidden Power of Social Networks: Understanding How Work Really Gets Done in Organizations’ (Harvard Business School Press, 2004), 157.

⁵⁸⁷ Irons (fn 583).

significantly reduced; this point may be correct given that the security services considered that there were 2,000 active terrorists in the UK and only 52 of them were placed on a control order.

As Donald Rumsfeld, former US Secretary of Defense, stated:

"There are known knowns; there are things we know that we know. There are known unknowns; that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know."⁵⁸⁸

On a similar line (and some years earlier), Modica and Rustichini (1994) remarked:

'A subject is certain of something when he knows that thing; he is uncertain when he does not know it, but when he knows he does not: he is consciously uncertain. On the other hand, he is unaware of something when he does not know it, and he does not know he does not know, and so on *ad infinitum*: he does not perceive, does not have in mind, the object of knowledge. The opposite of unawareness is awareness...'⁵⁸⁹

Krebs (2002b)⁵⁹⁰ explained that covert networks and operations don't behave like normal social networks, with conspirators not forming many connections beyond their immediate connections already in existence, in order to reduce the likelihood of detection. Krebs explains that those within the network are frequently formed years ago in school and training camps which itself is related to the risk of radicalisation that will be discussed later in this chapter. With this in mind, Irons (2008) suggests that the best way forward is to form a judgment based on good information and with full recognition of the threat itself that is known to exist, then extend it where possible to the unknown. This can be linked to the use of TPIMs. By relaxing the restrictions on the use of telecommunications in TPIMs the security services and government have a greater chance of identifying other suspects who are in touch with a wider terrorist network, via telecommunications and those who act independently as 'solo-terrorists'. But the challenge the security service and government might face is that a

⁵⁸⁸ Rumsfeld, Donald. US Vice-President (2002) 'Known unknowns', (6th June) at NATO HQ, Brussels.

⁵⁸⁹ Salvatore Modica and Aldo Rustichini 'Awareness and partitioned information structures' 1994 Theory and Decision (July) 37(1): 107-124.

⁵⁹⁰ Valdi E. Krebs 'Mapping Networks of Terrorist Cells' 2002b Connections 24(3): 43-52, 49
<<http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM002810.pdf>> accessed 3rd July 2013.

suspect under a TPIM, knowing that they are subject to a TPIM, might curtail their use of telecommunications, meaning that they do not expose any network.

The MacDonald Report (2011) expressed concerns over the negative impact some obligations that could be imposed under a control order could have on evidence gathering and stated:

"The State has the capacity to monitor both telephone and internet use. It is inimical to the process of criminal justice to cut off precisely those means of communication between criminals that may readily be monitored, providing evidence for prosecution. In any other investigative context, the removal of a suspect's ability to communicate with his co-conspirators on easily penetrated technology would be regarded as bizarre and wholly counter-productive."⁵⁹¹

The greater concern is that due to the time limits placed on the operations of TPIMs, those subjected to a TPIM simply need to wait a maximum of two-years before carrying on from where they left off (Middleton, 2011b). As Zedner (2014) explains, TPIMs label suspects as being known to the authorities which will ultimately 'limit their movement, communication, and associations, which has the effect of inhibiting the collection of evidence',⁵⁹² reduces security services and governments' ability to identify terrorist networks, as discussed earlier, and interferes with any possibility to a successful prosecution. In this regard a two-year limitation period could be a hindrance, whilst human rights thinkers would rather have a limitation period instead of an indefinite period of time as seen under the former regime. This highlights the conflicting considerations affecting the importance of imposing obligations that do not hinder the security service or government, but instead support it to prosecute suspects, in accordance with CONTEST.

In context of ETPIMs, greater restrictions on telecommunications can be imposed without a minimum level of communication being acceptable, giving rise to the possibility of a total ban (Schedule 1, clause 8 ETPIMB 2011). Given that ETPIMs may be seen to 'represent a return to the old control order regime'⁵⁹³ as a preventative measure it raises some of the more

⁵⁹¹ MacDonald Report (fn 23) 29.

⁵⁹² Zedner (fn 514) 101.

⁵⁹³ Joint Committee on the Draft ETPIM Bill (fn 535) 12.

serious risks already discussed, namely: (i) imposing a ETPIM can cut off the blood supply of terrorism; (ii) the suspect is made aware that they are being monitored and if they are/were involved in terrorist-related activity would be able to curtail that behaviour. As a consequence of these two points, the security service, government and police may struggle to identify other potential terrorist threats and activity as well as obtain other vital evidence and information to potentially prosecute. In light of the Court of Appeal's decision in the *Smith and Others* case regarding SOPO's, it is important to note that restrictions on the use of telecommunications have been held necessary and proportionate against terrorist suspects under control orders (see: *AM v Secretary of State for the Home Department*),⁵⁹⁴ which similarly would apply under TPIMs and ETPIMs. The restrictions on the use of telecommunications can affect the qualified rights under Article 8 – 11, although may be taken into account when taking a holistic evaluation of deprivation of liberty under Article 5(1) (Fenwick, 2013); this will be considered later in this chapter.

(iii) *The removal of the relocation obligation under TPIMs, but its retention under ETPIMs*

The decision to remove the relocation obligation under the TPIMs most likely follows the decision of *Secretary of State for the Home Department v AP*.⁵⁹⁵ As mentioned earlier in this chapter, the government's decision to remove the right to impose the obligation of relocation under TPIMs was welcomed by many including Liberty; although remains available under ETPIMs, and therefore has not been dropped completely. This type of obligation was discussed in Chapter Three. There was discussion of *CD v Secretary of State for the Home Department*⁵⁹⁶ in which CD had a control order imposed from February 2011 which was modified, requiring him to relocate from London to the Midlands away from his family. The Secretary of State was aware that "relocating a person can have a detrimental impact on his social life";⁵⁹⁷ despite this the court believed that there was justification in that there was 'fear that he would engage in terrorist-related activity'⁵⁹⁸ and therefore the obligation to relocate

⁵⁹⁴ *AM v SSHD* (fn 326).

⁵⁹⁵ *SSHD v AP* (fn 19).

⁵⁹⁶ *CD v SSHD* (fn 317).

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid* [51].

was necessary and proportionate. Nevertheless, Mr Justice Simon remarked, 'I recognise that the interference with CD's rights is substantial.'⁵⁹⁹

Relocation had been viewed by the courts as an obligation that would interfere with a person's Article 8 rights; the UK Supreme Court did not find an infringement on the basis that it was justified under Article 8(2) (*Secretary of State for the Home Department v AP*).⁶⁰⁰ The UK Supreme Court took account of the relocation as an Article 5 matter, viewing it as giving rise to a deprivation of liberty; this was achieved by the court taking into account the overall impact caused by other obligations (eg 16 hour curfew) combined with the relocation obligation, which might cause the suspect and his family to suffer. The *AP* case and subsequent discussion by Parliament or the government failed to address an important question posed by Fenwick and Phillipson (2011): if the imposed hours had been less or had the relocation been less of an inconvenience, would the court have reached the same conclusion?

In comparison to the *AP* case, in *CA v Secretary of State for the Home Department*⁶⁰¹ the court delivered a potential blow to the government's power to relocate suspect terrorists. Mr Justice Mitting, when hearing the appeal by the controlee, upheld the appeal against the relocation requirement. When examining the proportionality of the Home Secretary's decision to relocate CA it was held that '[b]reaking up loose groups of individuals, by dispersion of some of them'⁶⁰² minimised the risk they pose. However, the judge identified the effect the obligation had on CA's family life and accepted the evidence of CA's wife who:

'...has persuaded me [Mr Justice Mitting] that her husband's relocation to Ipswich has imposed an unendurable strain upon her and risks the permanent breakdown of the marriage – an event which, if it were to occur, would not only have an adverse impact upon her and her

⁵⁹⁹ Ibid [53].

⁶⁰⁰ *SSHD v AP* (fn 19).

⁶⁰¹ *CA v SSHD* (fn 57).

⁶⁰² Ibid [8].

children, but might also increase the risk of re-engagement in terrorism-related activities by CA.⁶⁰³

At paragraph 8, the judge identified three reasons which supported him in upholding the appeal:

- (1) Keeping the family united would mitigate the risk posed by the suspect, particularly given that the judge accepted that CA's wife was never aware of what he was doing and abhors extremism;
- (2) Permanent separation of CA from his family is more likely to exacerbate the risk he could pose, which the judge found to be a real risk if the family were separated; and
- (3) 'it is not justifiable to secure the undoubted advantage of removal...at the price of the unity and welfare'⁶⁰⁴ of CA and his family.

This considered approach to the relocation of terrorist suspects encourages and supports the need of government to have an "exit strategy"⁶⁰⁵ and 'rehabilitate' the thinking of terrorist suspects so that at the end of their time on a TPIM etc they are less of a risk. It was acknowledged in *Secretary of State for the Home Department v AM*⁶⁰⁶ that suspects should be encouraged to lead a normal life:

"Deportation is impermissible and prosecution unlikely. The only viable exist strategy is encouraging and facilitating a change in outlook by AM. To that end, it is imperative that he is encouraged to lead as normal a life as possible...Maintenance of a measure which is either over-restrictive or ineffective does not serve that end."⁶⁰⁷

It would appear then that the courts have largely accepted that relocation as an obligation can breach a person's human rights; however this infringement comes under Article 5 and not Article 8 as one might expect. The domestic courts have interpreted the obligation as a matter relating to liberty rather than an impact upon ones family life, although this seems contrary to the judgment in the CA case. The judgment in the CA case demonstrates that the courts are prepared to engage with risk assessment and with determining proportionality of an obligation; the assessment process carried out by Mr Justice Mitting is similar to the process carried out when considering bail in criminal proceedings, as discussed in Chapter Three.

⁶⁰³ Ibid [3].

⁶⁰⁴ CA v SSHD (fn 57).

⁶⁰⁵ Secretary of State for the Home Department v AM [2012] EWHC 1854 (Admin) [30].

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid [30].

As mentioned earlier, the relocation obligation remains an open and viable option to the Secretary of State under the ETPIMB 2011 Schedule 1 or under temporary ETPIM provision under s26 TPIMA 2011. The relocation obligation has been viewed as a particularly effective aspect of the control order regime, usefully retained in the ETPIMB 2011:

"...it is easier to police generally in some locations in others. It is to do with associations and demographics, and with the ease of operations. Surveillance in some areas is far easier than in others. All those things come into play."⁶⁰⁸

It is understood that this opinion is one which Anderson QC (2013) supports, adding that the relocation obligation may be a repugnant notion, yet is a useful tool in some cases.⁶⁰⁹ The report by Anderson QC (2014) reported that locational constraints should be strengthened, suggesting the re-introduction of relocation of suspects. Although it can be conceded that relocation may remove a person from terrorist activity/involvement. It acts as a short-term solution, but is not a long-term solution. This assessment can be attributed in two ways:

- (i) At the end of the EPTIM, the suspect may continue to be involved in the terrorist activity. By removing the individual it again becomes possible that the terrorist network which they are a part of goes unidentified, similar to discussions about relaxed use of telecommunications above; and
- (ii) The *CA* case confirms that relocation of a suspect can have the effect which causes the suspect to resent the UK and the government, which in turn potentially facilitates and hardens their attitude to be involved in terrorist-related activity even at the end of the ETPIM. The impact of relocation can have detrimental effects on the suspect's family life, which one would say breaches Article 8 ECHR yet case law illustrates that it would be used as a contributing factor to support a breach of Article 5 argument instead.

With these points in mind, if the relocation obligation were to be invoked, if ETPIMs were activated, it should only be for cases which would prevent an imminent threat of terrorism; otherwise one may argue the long-term consequences do not support the short-term gain of prevention.

⁶⁰⁸ Joint Committee on the Draft ETPIM Bill (fn 535) 12.

⁶⁰⁹ *Ibid.*

(iv) *The obligations imposed need to be proportionate*

When addressing Article 5 ECHR there are no provisions within the Convention which overtly demand proportionality from the state towards the citizen. The assessment of deprivation of liberty was clearly set out by the criteria in the *Guzzardi* case; however, it is worth recognising that breaches of other Convention rights may support the determination of whether a TPIM or ETPIM is Convention compliant. It is therefore important to note that other ECHR rights do provide some sense of proportionality; for example, Articles 8 to 11 provide the rights 'in accordance with the law' or as 'is necessary in a democratic society' which become relevant in assessing proportionately of measures in context of human rights opposed to other holistic forms of assessment such as risk assessment. In order for obligations under TPIMs to avoid ECHR breaches (and to an extent to avoid hindering any possible prosecution), the Secretary of State needs to ensure that the obligations are proportionate. Discussion relating to necessity and proportionality became the main subject for conversation at the Bill stage of the TPIMA 2012 when the Home Office provided an 'ECHR Memorandum' (Home Office, 2011b). Under this the Home Office affirmed that obligations imposed under a TPIM that interferes with the right of an individual under the ECHR will be assessed as being 'necessary and proportionate'⁶¹⁰ and achieved with various safeguards being available under the TPIMA 2011. Under the 'ECHR Memorandum' the Home Office explained that any obligation would be imposed because it was deemed 'necessary', adding that 'necessity is a high test'.⁶¹¹ It was the Home Office's opinion that under the former regime the courts would assess the proportionality of the obligations imposed and it considered that the domestic courts would continue this practice under TPIMs (Home Office, 2011b). For example, in the case of *BH v Secretary of State for the Home Department*⁶¹² which related to the relocation of the controlee, meaning that Article 8 was engaged, Mitting J stated 'applying Wednesbury principles, I would not hold [the relocation] to be flawed; but applying the more intensive review required by the proportionality test, I am

⁶¹⁰ Home Office 'Terrorism Prevention and Investigation Measures Bill: ECHR Memorandum by the Home Office' 2011b <http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98372/echr-memorandum.pdf> accessed 7th July 2013.

⁶¹¹ Ibid.

⁶¹² *BH v Secretary of State for the Home Department* [2009] EWHC 3319 (Admin).

satisfied that it would be disproportionate on the basis of current information to remove *BH* to Leicester.⁶¹³

The Home Office remarked that the domestic courts would be able to determine the proportionality of TPIMs as they did of the former regime; the domestic courts would achieve this by 'following the law' as set out in *R (Daly) v Secretary of State for the Home Department*⁶¹⁴ by Lord Steyn who held:

"First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of national or reasonable decision. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex p. Smith* [1996] *QB* 517, 554 is not necessarily appropriate to the protection of human rights. ...In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."⁶¹⁵

When assessing proportionality under the former regime, and now under TPIMs, as explained in Chapter Three reference should be given to the case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,⁶¹⁶ the court should ask:

"[w]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.⁶¹⁷

Assessment of proportionality through the *de Freitas* case is considered by Gearty (2005c) as an appropriate way of assessing proportionality. From the cases such as *JJ* and *MB* there has been an assessment of whether specific obligations are proportionate because the courts

⁶¹³ Ibid [45].

⁶¹⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

⁶¹⁵ Ibid [27].

⁶¹⁶ *de Freitas* (fn 250).

⁶¹⁷ Ibid [80]. Also see: Gearty (fn 251).

confirmed that curfew obligations of 14 hours were acceptable (as a maximum), depending upon the other imposed obligations. As TPIMs are a lighter version of the former control order regime, the obligations that are available to be imposed are likely to be held proportionate and as any curfew obligation would run through the night when a person is more likely to be at home, this reduces the possibility that a person's day-to-day life is significantly reduced as to cause a deprivation. With ETPIMs being a replica of non-derogating control orders one can pre-suppose that the measure would likewise be considered proportionate, however this would depend upon the imposed measures particularly when the Secretary of State has the available option of a relocation obligation.

(v) *Time limitation for the enforcement of TPIMs and ETPIMs*

As a way of monitoring individual TPIMs and the obligations imposed in each TPIM, the limitation period of two years for a TPIM to be imposed on a suspect has been welcomed (Fenwick, 2012b; 2013; Walker, 2013). It is thought that having a deadline of two years, the security service, government, police and Crown Prosecution Service (CPS) will keep the suspects 'detainment' under review to secure prosecution and determine whether it is possible to prosecute (Fenwick, 2012b; 2013), or face the likelihood that the suspect will have to be released.

Under the former regime, once a non-derogating control order was made it could be renewed every 12 months, compared to derogating control orders which would be renewed every 6 months (s13 PTA 2005). A control order had no limitation to the number of times it could be renewed; similar to the s44 stop and search power, which as discussed in Chapter Two was abused by using a 'rolling-programme' of renewal. Under the TPIMA 2011, a TPIM may only be extended once for a further 12 months (s5(2) TPIMA 2011) beyond the first 12 months since the TPIM was imposed (s5(1) TPIMA 2011). The Secretary of State may only extend a TPIM beyond the two year limitation where evidence emerges and identifies that the suspect has re-engaged with terrorist-related activity (s3(2) and s3(6) TPIMA 2011; clause 2(2) and (6) ETPIMB 2011). This change alters a fundamental characteristic of the former regime as compared to TPIMs: the former regime was used in most cases as a long-term measure, despite having to be renewed which may have given the impression that control

orders were short-term measures; TPIMs are genuinely short-term measures due to the limitation period. As mentioned earlier in this chapter, there is concern that a suspect under a TPIM may wait until the end of the limitation period before re-engaging with terrorist related activity (Middleton, 2011b).

When referring to Table G (above), there would be understandable concern that most controlees under the former regime remained on a control order for more than two years. Despite this there were zero successful convictions, although there had been prosecutions against four terrorist suspects who were under a TPIM which all resulted in an acquittal (Anderson QC, Independent Terrorism Review, 2013).⁶¹⁸ Middleton (2011b) finds that the use of a limitation period is an important safeguard under TPIMs. When giving evidence at Parliament,⁶¹⁹ Fenwick (2012b) remarked that the time limits of TPIMs may lead to the security services and government focussing on securing a prosecution, which would support the UK Strategy under CONTEST. Many academics give support to securing a conviction through the criminal justice system (Waldron, 2010; Middleton, 2011b; Zedner, 2014); this falls in line with the Criminal Justice Model, which this study supports. Zedner (2014) suggests that use of coercive measures such as control orders or TPIMs/ETPIMs, has resulted in the abandonment of prosecution entirely in relation to certain suspects. The 'priority of prosecution' is considered a watchword amongst some academics, including Zedner and Waldron, viewing the use of the Criminal Justice Model as the best way to ensure the protection of rights and effective scrutiny for those suspected of serious offences, such as terrorism; a view also supported by Lord MacDonald when appearing before the Joint Committee on Human Rights (2010-2012a).

The scheme is intended to be capable of controlling the suspect through the imposed obligations under a TPIM; however, some obligations that were used under the former regime were not only intrusive but made it impossible for a suspect to live a normal life which also affected the controlees' families and their communities. The Joint Committee on Human Rights (2009-2010a) remarked its concerns over this issue with the former regime:

⁶¹⁸ Anderson QC (fn 47).

⁶¹⁹ Fenwick (fn 517).

'We remain extremely concerned about the impact of control orders on the subject of the orders, their families and their communities. There can be no doubt that the degree of control over the minutiae of controlees' daily lives, together with the length of time spent living under such restrictions and their apparently indefinite duration, have combined to exact a heavy price on the female partners and children of the controlees, including on their employment of their basic economic and social rights as well as their right to a family life, is an example of the "collateral impact" of counterterrorism measures recently identified by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counter terrorism.'⁶²⁰

In response to this, HM Government explained that whilst they take very seriously the 'impact on the individual and his family, including their physical and mental health',⁶²¹ it is deemed not to 'automatically outweigh the national security case against him'.⁶²² In support of this view, the government relied upon the case of *Secretary of State for the Home Department v Abu Rideh*.⁶²³

"While account must be given to his mental health problems, they do not trump the national security case against him. That national security case means it is legitimate for him to be subjected to a control order with consequent restrictions.'⁶²⁴

This indicates that it is important to impose appropriate, proportionate and effective obligations upon the suspect, but also indicated the negative impact that the obligations can have upon the suspect and their close connections. Whilst these are issues that existed under the former regime, they may also arise under TPIMs, given that some view TPIMs as simply a rebrand of the former regime.

When discussing the former regime and the available powers under TPIMs, the Home Secretary, Theresa May MP, advised Parliament that it would be disingenuous to think TPIMs would be 'more "flexible"'⁶²⁵ given that each control order was tailored to the threat posed by and the requirements of each controlee. Given the concerns raised above about the

⁶²⁰ Joint Committee on Human Rights (fn 58) 44.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ *Secretary of State for the Home Department v Abu Rideh* [2007] EWHC 804 (Admin).

⁶²⁴ Ibid [2007]. Also see: Joint Committee on Human Rights (fn 58).

⁶²⁵ House of Commons (fn 534).

impact upon the suspect and their close connections, this keeps those concerns alive within TPIMs.

TPIMS AND ETPIMS: THE ON-GOING RELATIONSHIP WITH HUMAN RIGHTS

Just like the former regime, TPIMs and ETPIMs deal with persons suspected of terrorist-related activity who have not been found guilty at trial. Due to the controversial history of control orders, it is clear that the government had to be cautious in its drafting and implementation of TPIMs and ETPIMs, particularly in relation to human rights. The government released the 'ECHR Memorandum'⁶²⁶ during the TPIMB confirming that 'the measures that may be imposed on an individual under a TPIM notice will engage Convention rights.'⁶²⁷ The former regime faced a range of legal challenges which demonstrated that the domestic courts were prepared to adopt a narrow interpretation of human rights, most notably in relation to the interpretation of deprivation of liberty (Fenwick and Phillipson, 2011). In Chapter Three when this was discussed in relation to control orders, the main human rights issues fell under two main ECHR Articles under which followed sub-issues:

- (i) Article 6 ECHR
 - a. Disclosure;
 - b. Judicial involvement;
 - c. Special Advocates;
 - d. Due process.
- (ii) Article 8 ECHR
 - a. Impact on the suspect's family.

It is important to realise from discussions in previous chapters that the latter two sub-issues may also relate to Article 5 protections. Whilst TPIMs are considered to be 'control orders lite' (Fenwick, 2011; Zedner, 2014) and have been considered as a 'softened' control order (Walker and Horne, 2012; Fenwick, 2013); ETPIMs are more closely akin to the former 'heavy touch' control order regime (Fenwick, 2013). It is generally accepted that the human rights issues under the former regime will be replicated in one way or another (Fenwick, 2012) by both TPIMs and ETPIMs. There is recognition from some, such as Mylonaki and

⁶²⁶ Home Office (fn 609).

⁶²⁷ Ibid.

Burton (2011), that the TPIM scheme is more flexible, but still restricts the civil liberties of terrorist suspects' "in the name of public safety and national security".⁶²⁸ Measures such as control orders and now TPIMs have led to the emergence of a new tension caused by counterterrorism measures. It has long been understood that there exists a tension between liberty and security; now there is also a tension between due process and security (Tomkin, 2011; Ip, 2012) caused by the varying procedural 'safeguards', including special advocates and closed hearings, introduced to allow the government to impose measures such as TPIMs.

Article 5 ECHR and the Right to Liberty

The concept of deprivation of liberty is determined by the longstanding case of *Guzzardi v Italy*⁶²⁹ under which the ECtHR established that the difference between "deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance".⁶³⁰ It is known that from the *Guzzardi* case the starting point for one to identify whether someone has been "deprived of his liberty" under Article 5 requires consideration of the range of criteria; these criteria were reaffirmed in the *Gillan and Quinton v United Kingdom*⁶³¹ and discussed in Chapter Two.

During the course of legal challenges against the former regime, the domestic courts spent a great deal of time considering the argument that control orders caused a deprivation on one's liberty; Ewing and Tham (2008) explain that evidence has been heard by the Joint Committee on Human Rights which affirmed that the former regime as one which created "domestic prisons".⁶³² Under the former control order regime the Secretary of State could impose any obligation upon a controlee on the proviso they did not breach Article 5 ECHR. The TPIMA 2011 and ETPIMB 2011 provide specified obligations under Schedule 1 of both instruments; the former provides more restrictions on the obligations the Secretary of State may impose, whilst the latter provides measures similar to the 'heavy touch' control orders seen under the former regime (Fenwick, 2013). Schedule 1 TPIMA 2011 provides a clear attempt of

⁶²⁸ Emmanouela Mylonaki and Tim Burton 'Controlling civil liberties while confronting terrorism: the case of Terrorism Prevention and Investigation Measures' 2011 Web Journal of Current Legal Issues, 5 <<http://www.webjcli.ncl.ac.uk/2011/issue5/mylonaki5.html>> accessed 25th June 2013.

⁶²⁹ *Guzzardi v Italy* (fn 137).

⁶³⁰ *Ibid* [93].

⁶³¹ *Gillan and Quinton v United Kingdom* (fn 15).

⁶³² Ewing and Tham (fn 59).

ensuring the TPIM scheme is unlikely to breach Article 5; although both schemes have been communicated as avoiding deprivation of liberty as per Article 5(1). Fenwick (2011) explains, taking account of the *JJ* and *AP* cases, that the PTA 2005 effectively redefined the ambit of 'deprivation of liberty' under Article 5 and the domestic courts were "drawn into a partial acceptance of this in the counter-terrorism context".⁶³³ The TPIMA 2011 does not recognise the findings or limitations imposed by the *JJ* case or the *AP* case. There are no provisions expressly limiting the number of hours a suspect may be placed under a curfew (Middleton, 2011b) apart from the fact that the curfew can only be 'overnight' or a limit on the combinations of obligations that may be imposed before a breach of Article 5 ECHR will be found.

Earlier in this Chapter there was discussion surrounding the relaxed use of telecommunications under TPIMs and the SOPO case of *Smith and Others*. As explained, in that case a complete ban on the use of the internet was held to be oppressive and disproportionate as the Court of Appeal regarded internet use as an "essential part of everyday living".⁶³⁴ Wagner (2012) explains that telecommunications such as "email, Skype, Facebook and Twitter are now essential tools of interaction".⁶³⁵ These findings might be taken to indicate that restrictions on the use of telecommunications, including the internet, could potentially breach Article 5 or 8 ECHR. Silber J in *AM v Secretary of State for the Home Department*⁶³⁶ ruled that a complete internet ban upon terrorist suspects is lawful, which is a questionable decision in light of the *Smith and Others* case; in the latter case, the defendants had been convicted, whereas *AM* remained a suspect and had not been convicted of any terrorist offence. Wagner (2012) views this matter as an Article 8 ECHR matter; yet legal challenges under the former regime have seen the domestic courts deal with Article 8 matters under Article 5, as demonstrated in *Secretary of State for the Home Department v AP*⁶³⁷ and *CA v Secretary of State for the Home Department*.⁶³⁸

⁶³³ Fenwick (fn 546) 130.

⁶³⁴ *R v Smith and others* (fn 576) [20].

⁶³⁵ Adam Wagner 'Is internet access a human rights?' 2012 UK Human Rights Blog One Crown Row <<http://ukhumanrightsblog.com/2012/01/11/is-internet-access-a-human-right/>> accessed 10th July 2013.

⁶³⁶ *AM v SSHD* (fn 326).

⁶³⁷ *SSHD v AP* (fn 19).

⁶³⁸ *CA v SSHD* (fn 57).

The courts held in the *AM* case that a complete ban on internet use under a control order was lawful, and this decision is likely to be upheld if challenged in relation to TPIMs. But when taking into account the Court of Appeal decision in *Smith and Others*, the decision of *AP* when considering breaches of Article 5 and the clear intention of making telecommunications more accessible to terrorist suspects under TPIMA 2011, there may be a potential argument for suggesting that a curfew, combined with extensive restriction on telecommunications and on movement, could create a breach of Article 5. That might also apply if the relocation obligation was ever used as part of such a package of restrictions under a Temporary ETPIM or an ETPIM.

On the other hand, as explained by Wagner (2012), telecommunications are an essential tool of interaction and may be an alternative way of rendering relocation less onerous. Access to the internet to keep in contact with family may be the alternative solution to ensure that the relocation of suspects is proportionate under ETPIMs, rather than necessarily viewing the measure as disproportionate as per *CA v Secretary of State for the Home Department*.⁶³⁹

The government explained the compliance between TPIMs and deprivation of liberty under Article 5. Under the 'European Convention of Human Rights Memorandum',⁶⁴⁰ the Home Office assesses deprivation of liberty as an individual being 'actually confined'⁶⁴¹ which is considered to be "the length of the period for which the individual is confined to their residence".⁶⁴² The government explained that consideration would be given to the effects of other obligations imposed. The European Convention of Human Rights Memorandum clearly does not assess deprivation of liberty in accordance with *Guzzardi*, but rather views deprivation of liberty as the effects of obligations and measures upon a person's physical freedom. Similarly, the memorandum and government have failed to take into account the decisions of the *E* case and *AF* case, undermining their focus and discussions of the 'notion of degrees of restrictions' and the consideration of whether the measures imposed have such an impact upon the suspect that they unduly damage their ability to live a normal life (Fenwick, 2011).

⁶³⁹ *CA v SSHD* (fn 57).

⁶⁴⁰ Home Office (fn 609).

⁶⁴¹ *Ibid* 22.

⁶⁴² *Ibid*.

There is also the issue of coercion, this arises due to the threat of a criminal sanction that may be imposed for breaching an obligation under a TPIM without reasonable excuse (s23 TPIMA 2011). Whilst any residency obligation will be imposed during the course of the night, a period of time when they are more likely to be at home, other obligations that are imposed may cause restrictions that are difficult for the suspect not to breach; this was a risk mentioned in Chapter Three. The suspects need to self-regulate their behaviour which may be recognised as "self-surveillance and self-policing"; this can adversely affect the quality of life lived by the suspect, their family and friends (Zedner, 2007b). Use of coercion in certain counter-terrorism measures is a factor that can aid in giving rise to a breach of Article 5. This was found in *Gillan and Quinton v United Kingdom*⁶⁴³ when the police, as the state authorities, used the stop and search power under s44 under Terrorism Act 2000 before it was repealed and replaced by s61 Protection of Freedom Act 2011 (although the Court in the end decided the case under Article 8). When considering the *AP* case and more recent cases such as *CF* the domestic courts have taken into account the impact that restrictions have upon a suspect and their families and friends when determining a deprivation of liberty.

A further aspect of the deprivation of liberty argument comes from the duration a person is subjected to the restrictive measure; duration is one of the factors to consider to determine a deprivation of liberty under the *Guzzardi* criteria. Under the TPIM scheme a suspect is placed under a TPIM for one year, which may then be extended for a further year. Whilst most of the control orders that had previously been imposed existed for two years or more (see Table G above), it is not known how long the remaining nine under the former regime had a control order imposed against them before being subjected to a TPIM. It is also important to consider that the Secretary of State has the power to impose a Temporary ETPIM (s26 TPIMA 2011) or an ETPIM, if the ETPIMB is enacted; therefore so long as the legislative requirements are met the current controlees (or some of them) could be subjected to an ETPIM at the end of 2013. Ultimately, it is highly possible that terrorist suspects who are placed upon a TPIM may be subject to the measures for a period of time much longer than the time period under the Act provides. Some of those nine suspects previously subjected to a control order are likely to have been and will be subject to control measures for a number of years if ETPIMB

⁶⁴³ *Gillan and Quinton v United Kingdom* (fn 15).

is enacted. Despite this, unless they engage in fresh terrorist-related activity, they do have a guarantee as to the point when the measures will be lifted (the end of 2015).

Given that TPIMs are considered Article 5 ECHR compliant and are a light version of the original control order regime, as mentioned earlier there is unlikely to be legal arguments of a deprivation of liberty. Even when under a TPIM a suspect is given a curfew obligation, the majority of the curfew will cover the evening period when a person would be expected to be at home (*Secretary of State for the Home Department v BM*).⁶⁴⁴ In comparison, with ETPIMs being more akin to the original control order it follows that the legal challenges brought against the former regime, particularly those discussed above and in Chapter Three, are relevant to ETPIMs. To impose curfew and relocation obligations, the decisions in *JJ*, *E*, *MB* and *AP* are highly relevant. This was similarly confirmed in the ECHR Memorandum released by the Home Office (2011b).

Coercion and a deprivation of liberty

Whilst in the *Gillan and Quinton* case, in which both applicants were subjected to detention for a period of 30 minutes approximately, the ECtHR did not rule on whether Article 5 had been breached because it found a violation under Article 8 ECHR. It indicated instead that it would have found that the s44 stop and search powers created a breach of Article 5 because of the coercive nature of the measure; the court found, with the support of *Foka v Turkey*:⁶⁴⁵

"[Those searched] were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5(1)".⁶⁴⁶

Due to their coercive nature, the importance of compliance or the likelihood of facing a criminal sanction for non-compliance, and the duration of time that the suspect is subjected to the measure, it is arguable that certain TPIMs might be found to create a breach of Article 5.

⁶⁴⁴ *Secretary of State for the Home Department v BM* [2012] 1 WLR 2734; [2012] EWHC 714 (Admin).

⁶⁴⁵ *Foka v Turkey* (fn 144).

⁶⁴⁶ *Ibid* [57].

This is even more likely to be the case in respect of ETPIMs, if introduced. Creation of deprivations of liberty is a good example of ‘disaggregation’, which stems from securitization, because in the process of determining deprivation of liberty or breaches of various other rights, the courts have to consider the distinction between incarceration and freedom and various aspects of potential freedom which the government may suspend, such as placing restrictions on the use of telecommunications, a concept discussed in Chapter Three.

Because the courts did not reject the former control order regime and brought it more in line with Article 5 requirements (Ewing and Tham, 2008; Fenwick, 2013), the development of TPIMs and ETPIMs has been possible. Both measures aim to interfere with the day-to-day life of the suspect in order to prevent them from engaging with terrorist-related activity, whilst simultaneously remain Article 5(1) compliant by not creating a deprivation of liberty. Anderson QC confirmed at the ETPIM Parliamentary debate,⁶⁴⁷ that TPIMs and ETPIMs are compatible with the ECHR. Of the two, compliance issues are more likely to arise under ETPIMs which utilises the control order case law, such as *JJ* and *AP*, to confirm that only a physical restraint or detention causes a deprivation of liberty; this does not take into account the holistic criteria of *Guzzardi* under which it is possible to assess the impact of the obligations collectively, and the impact it has in terms of deprivation. ETPIM allow for a curfew, relocation and telecommunication restrictions as obligations and has a strict coercive compliant nature. Not forgetting that nine of those under a TPIM were originally subject to a control order and may become subject to an ETPIM, the application of the *Guzzardi* criteria would likely find a deprivation of liberty can exist. This just demonstrates the long history of wide interpretation to the meaning and application of Article 5, to which the courts take a deferential approach.

Article 6 ECHR and the Right to a Fair Trial

Procedural fairness provided much controversy for the former control order regime in light of the issues regarding disclosure of closed material; special advocates and closed hearings (see Chapter Three). The legal challenges and subsequent judgments still apply to the TPIM and

⁶⁴⁷ Joint Committee on the Draft ETPIM Bill (fn 535).

ETPIM schemes. Whilst the Home Office declared that TPIMs were ECHR compliant, it is important to note that many of the breaches caused by the counterterrorism measures that have been examined in this thesis, have identified that human rights issues are raised when the measures are enforced, as this is when the measure is operative. The cases of *MB*⁶⁴⁸ and *AF*⁶⁴⁹ determined that the former regime does not amount to a criminal charge; therefore the standard criminal protections and guarantees do not apply under Article 6(3); Article 6(1) however does apply. This is a basic example of the former regime being a form of securitization, as discussed in Chapter Three. Considering this finding, reference to *DS v Her Majesty's Advocate*⁶⁵⁰ Lord Hope observed that "Article 6(1) [is] a fundamental right which [does] not admit of any balancing exercise...the public interest could never be invoked to deny that right to anybody in any circumstances".⁶⁵¹ As discussed in Chapter Three, the domestic courts have accepted a minimisation of the rights under Article 6(1) (eg innocent until proven guilty, fair trial and full disclosure of the case against the suspect) in terrorism cases. But in the *AF* case minimum standards (of disclosure) were found to apply. Given the interpretations in *MB* and *AF*, coupled with the fact that TPIMs have replaced control orders, this interpretation will remain.

The TPIMs and ETPIMs continue to give rise to the same concerns as the former regime under the Article 6, meaning that the issues discussed in Chapter Three apply. These include: the use of special advocates, the on-going attitude that the suspect is guilty until proved innocent, closed material hearings, lack of full disclosure of evidence and a limited judicial involvement within the process. This latter concern arises under the TPIMA 2011 and makes this measure of countering terrorism a politically based matter rather than a fully legal-based one, as will be discussed in due course; Zedner (2014) reiterates in this context the old adage that "it is better for ten guilty men to go free than for one innocent man to face conviction". This point has been made by many including Dworkin (2002),⁶⁵² Waldron (2010)⁶⁵³ and Zedner (2014) who believe that "[i]f they are innocent, the injustice of convicting and

⁶⁴⁸ *SSHD v MB and AF* (fn 54).

⁶⁴⁹ *AF v SSHD* (fn 20).

⁶⁵⁰ *DS v Her Majesty's Advocate* (fn 278).

⁶⁵¹ *Ibid.*

⁶⁵² Ronald Dworkin 'The threat to patriotism' 2002 *The New York Review of Books* (31st January) 49(3): 1-15 <<http://www.nybooks.com/articles/archives/2003/nov/06/terror-the-attack-on-civil-liberties/>> accessed 22nd June 2012.

⁶⁵³ Jeremy Waldron 'Torture, Terror and Trade-Off's: Philosophy for the White House' (Oxford: Oxford University Press, 2010).

punishing them is at least as great as the injustice in convicting some other innocent person for a less serious crime".⁶⁵⁴ This is a matter of due process and the protections guaranteed under the criminal justice system, as supported by Dworkin (2002) and Waldron (2010), is most pertinent when dealing with greater and more serious potential crimes which the suspect is impliedly accused of due to his/her alleged involvement in terrorist related activity. Although as mentioned in Chapter Three, Fenwick (2007; 2012b; 2013) has questioned the assertion that terrorist related activity is serious because involvement in it does not distinguish those that play a small role and those that play a greater role; in this context a person who transfers funds into a terrorist bank account provides a lesser threat compared to the suspect that intends on using such funds to carry out a terrorist attack. Judicial involvement becomes a vital component of ensuring powers are not abused, particularly when the measures such as TPIMs and ETPIMs can be considered coercive in nature.

Due Process: Special advocates and judicial involvement

The use of special advocates developed from the *Chahal* case⁶⁵⁵ when the ECtHR identified a better system in Canada for dealing with national security matters in the immigration system. Within this system special legal representatives with security clearance were used to challenge sensitive material. The UK implemented the use of 'special advocates' when implementing the Special Immigration Appeals Commission Act 1997, as discussed in Chapter Four. It is widely known that the special advocates were adopted under the former control orders regime which was highly controversial (Crowther, 2010). The Joint Committee on Human Rights (2009-2010b) accepted that special advocates provided a safeguard to an "otherwise purely arbitrary decision-making"⁶⁵⁶ process. This was similarly the attitude of the courts in *MB*.⁶⁵⁷ Although there is support for the special advocate safeguard, the Joint Committee on Human Rights (2009-2010b) has suggested that it should not be used as a way of circumventing the need for disclosure as a way of "reduc[ing] the standards of fairness where the common law, or statute, or human rights law, or Article 6 say that it is a minimum requirement that you must know the case against you".⁶⁵⁸

⁶⁵⁴ Dworkin (fn 652).

⁶⁵⁵ *Chahal v United Kingdom* (fn 214).

⁶⁵⁶ Joint Committee of Human Rights (fn 64) 23: 61.

⁶⁵⁷ *Re MB* (fn 253).

⁶⁵⁸ Joint Committee of Human Rights (fn 64).

Under the TPIM scheme the use of special advocates has not been removed. Whilst the use of special advocates will not be considered a breach of Article 6, given that its use has been supported by the ECtHR in *Chahal*, it has been identified an adequate safeguard by domestic courts. What is fundamentally important is that as a safeguard it is not used to undermine or avert procedural fairness or human rights generally. For example, merely because a suspect has a special advocate it does not mean that the government should not disclose in full or in part the evidence against the suspect that formulates the measure imposed (*AF (No3)*). The issue of disclosure will be discussed later in this chapter. There have been long established concerns, certainly throughout the existence of the former regime, as to whether special advocates could effectively mitigate the potential unfairness caused by no or minimal disclosure (Ip, 2012). In other words, the problem does not relate to the professionalism or integrity of the special advocates themselves, but rather to the limitations they are placed under whilst still expected to fully and effectively represent the interests of their clients.

When a suspect is represented by a special advocate in a closed hearing, the presiding judge must ensure that the suspect's rights are protected at all times; this being an important aspect of the judicial role are considered 'specialists in the protection of liberty'.⁶⁵⁹ The Joint Committee on Human Rights (2009-2010b) reported that there needs to be a balance between the human rights of individuals and the safety and protection of the public and it is the role of the court to maintain such a balance. Under TPIMA 2011 the court's reviewing power is limited under s6: the court may determine whether "the relevant decisions of the Secretary of State are *obviously flawed*".⁶⁶⁰ The court is entitled to consider the Secretary of State's decision to reasonably believe that it is "necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity"⁶⁶¹ to impose the obligations in question – these being the Conditions imposed under the Act. The court may give directions in relation to the obligations imposed (s6(9) TPIMA 2011) and under s9(5) TPIMA 2011 may give directions to the Secretary of State to revoke or vary a specific obligation (s9(5)(c) TPIMA 2011); in this regard the judiciary play an assessment role, although any directions to revoke or vary do not have to be complied with by the Secretary of

⁶⁵⁹ Ewing and Tham (fn 59).

⁶⁶⁰ Terrorism Preventative and Investigation Measures Act 2011, Section 6(3)(a).

⁶⁶¹ Ibid Section 6(4).

State. Taking into consideration the legal history of the former control order regime, and the legislative framework under TPIMA 2011, the courts are unlikely to quash a TPIM under s9(5) TPIMA 2011. It is possible that if the court directed revocation or variation of a TPIM or obligation, which the Secretary of State disagreed with, the ETPIM powers may be invoked as a matter of urgency to ensure the protection of the public and national security. It is clear that the TPIMA 2011 provides for limited judicial involvement, as Fenwick (2012b) explained to the Joint Committee on the Draft ETPIM Bill: '[t]he judicial involvement is obviously limited and nothing close to what it would be in a criminal trial in the amount of evidence that has to be disclosed....The judicial involvement is fairly limited and most of the material involved is closed material. This is problematic...'⁶⁶²

The TPIMA 2011 provides two levels of judicial involvement in the process of imposing a TPIM. Firstly, the court can consider the imposition of the TPIM on a subject, although for reasons expressed earlier and from the extensive discussion in Chapter Three the courts are unlikely to find that the decision of the Secretary of State was 'obviously flawed' in placing a suspect under a TPIM; this is similar to the former regime which Fenwick (2007; 2012b; 2013) also remarked upon. Secondly, the court is able to consider the imposed obligations and assess proportionality and necessity in accordance with the TPIMA 2011 and ETPIMB 2011. The concern remains that the courts will, to some extent, remain deferential to the government's arguments and as a consequence continue to impose TPIM's and obligations upon suspects whilst simultaneously applying a narrow interpretation to Article 6(1). A further problem within both of these levels of judicial involvement is that the court is *prima facie* limited to determining whether the Secretary of State's decision was obviously flawed, requiring the court to consider the information the Secretary of State had available at the time of making the TPIM. It therefore follows: if the Secretary of State reviewed the available evidence and intelligence and came to the conclusion that a TPIM was required, it would need to be seen by the courts that the Secretary of State's subjective opinion of the said information was clearly flawed. One may argue that this itself is a high standard to satisfy because the flaw needs to be 'obvious', meaning it cannot be anything less than clear; this undoubtedly retains the executive power of securitization. In *MB* case the Court of Appeal⁶⁶³ explained that if the Secretary of State's decision to impose a control order was obviously

⁶⁶² Fenwick (fn 517).

⁶⁶³ *SSHD v MB* (fn 254).

flawed, then the control order could be quashed. At the appeal, the court accepted that the control order interfered with the human rights of *MB*; thus ultimately a wide interpretation was adopted to Article 6, enabling the court to express satisfaction in the control order being imposed itself.

Given the concerns with human rights compliance, when the TPIMA 2011 passed through Parliament for scrutiny, the government provided a Memorandum explaining that the TPIM scheme complied with Convention rights. The Memorandum concluded that all aspects of TPIMs are Convention compatible due to the measures less stringent nature, higher threshold for enforcement and time limitation. As explained by Fenwick (2013) the journey of control order challenges has shown that Article 6 compliance depends upon the jurisprudence of s3 HRA 1998. The assessment by the Secretary of State is intelligence-led; in other words the information which gives rise to the TPIM usually comes from the security services. Lord Carlile QC (2006) confirmed that much of the information "is derived from intelligence. The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which there is needed a concerted and strategic response to terrorism".⁶⁶⁴ The patchy and fragmented nature of intelligence remains a risk with TPIMs as they did under the former regime (see Chapter Three). Intelligence gained and used by questionable methods (eg torture) should not be relied upon and would breach Article 6. As explained in Chapter Five, this would arise because admitting torture-tainted evidence is "manifestly contrary...to most basic international standards of a fair trial".⁶⁶⁵

The risk is that since information is not fully disclosed to the suspect, evidence originally obtained by torture might be relied upon to secure a TPIM or ETPIM. Similarly, the intelligence-based evidence which is relied upon by the Secretary of State may be circumstantial or considered inadmissible in normal criminal proceedings. One would argue that a process which allows such evidence to be used is 'obviously flawed', therefore making each TPIM and ETPIM revocable by the court. One would expect such questions to arise given the risks of unintelligibility which were discussed in Chapter Three and will be re-

⁶⁶⁴ Lord Carlile QC of Berriew (fn 231).

⁶⁶⁵ *Othman (Abu Qatada) v United Kingdom* (fn 341).

visited later in this Chapter. Given this risk, fair representation and disclosure becomes key safeguards for the suspect to rebut the allegations against them.

Due process: Closed hearings and disclosure

Closed hearings have become a main procedural part of counter-terrorism cases as seen under the former regime, and now under TPIMs; they are also forms used in deportation matters. The procedure to review TPIMs are governed and regulated under Part 76 Civil Procedure Rules (CPR) and in accordance with the legislative framework and the court apply judicial review principles to determine whether the Secretary of State's decision was obviously flawed. Matters of closed hearings and disclosure are specifically dealt with under CPR rule 76.22. The use of closed hearings in ordinary proceedings has become even more normalized under the Justice and Security Act (JSA) 2013 which allows 'closed material proceedings' (CMP) which similarly has procedural guidance under the Civil Procedure Rules Part 76. It is noteworthy that the JSA 2013 has no direct application to the procedural regulation of closed hearings. To ensure that Article 6 standards are reached in both TPIMs and ETPIMs proceedings, s3 HRA 1998 is relied upon as it was under PTA 2005 (Fenwick, 2013). The impact of closed hearings was explained by Dinah Rose QC at the Atkin Memorial Lecture (2012):

'It is impossible for me to adequately convey the frustration and helplessness felt by a barrister seeking to represent a client when a closed material procedure applies. I have sought to do it in control order and SIAC cases on many occasions. Most of your time is spent outside court, waiting to be allowed back in. When you are able to cross examine, you have no idea whether the questions you are asking are pertinent, or unhelpful. You do not know whether your submissions are on point, or wholly irrelevant. Representing a client in these circumstances has been described as like taking blind shots in the dark at a hidden target.'⁶⁶⁶

As explained in Chapter Three, the concerns from closed hearings is that the evidence or intelligence which gives the foundation to the Secretary of State's decision to impose a

⁶⁶⁶ Dinah Rose QC 'Beef and Liberty: Fundamental Rights and the Common Law' 2011 Atkin Memorial Lecture, 16 <http://www.reprive.org.uk/publications/2012_01_12_atkin_memorial_lecture/> accessed 4th February 2013.

measure like a TPIM, can predominantly be based on closed material which the suspect never obtains access to; dependent upon the level of disclosure given, the suspects can do little more than make generic assertions in their defence. In *Al-Rawi v The Security Service*⁶⁶⁷ Lord Hope explained that the court is the "guardian of fundamental principles, such as the right to a fair trial, the right to be confronted by ones accusers and the right to know the reasons for the outcome"⁶⁶⁸ and confirmed that "this is not the time to weaken the law's defences".⁶⁶⁹ Whilst the *Al-Rawi* case is not a terrorism related case, it addresses the same issues and concerns that this thesis considers. In the case Lord Dyson and Lord Hope considered the importance of 'open and natural justice':

"The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice."⁶⁷⁰

This confirms that rights provided by a fair and impartial due process should apply in keeping with natural and open justice, which is the basis on which the criminal justice system works. The development of the closed hearings under the former regime and now TPIMs cannot be described as being in full accordance with natural or open justice; it is for this reason that safeguards and protections by legal representatives, such as special advocates, and involvement in proceedings by the judiciary, is important. Whilst the use of special advocates is widely considered in the courts to be a safeguard in closed hearings, there are on-going concerns and arguments that special advocates themselves receive a "lack of institutional support".⁶⁷¹ Despite their best efforts to represent their client there are practical limitations on what they can and cannot do, including adducing evidence, counter government and security service assertions or communicate freely with their client (Justice, 2009; Kavanagh, 2010; Walker, 2011; Tomkins, 2011; Ip, 2012). It is important to note that on this last concern in *Home Office v Tariq*,⁶⁷² a non-terrorism case which involved closed material and special

⁶⁶⁷ *Al-Rawi v The Security Services* [2011] UKSC 34.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid* [22] and [72] (Lord Dyson and Lord Hope).

⁶⁷¹ John Ip 'Al Rawi, Tariq, and the Future of Closed Material Procedures and Special Advocates' 2012 *Modern Law Review* 75(4): 606 – 654, 618.

⁶⁷² *Home Office v Tariq* [2011] UKSC 35.

advocates, Lord Mance confirmed that special advocates could converse with their clients after seeing the closed material with the court's permission. Similar to the former regime, if permission were given in a TPIM case, the special advocate is restricted in what they can and cannot discuss with their client. In terrorism cases, like any other, the representative may need to clarify instructions in light of full disclosure.

Under the former regime the main legal challenges related to this point arose in *MB, A v United Kingdom*⁶⁷³ and *AF (No3)*. In the former case the majority of the House of Lords found that special advocates were an insufficient safeguard alone to ensure compliance with Article 6 ECHR; Lord Hoffmann, dissenting held that their use was a sufficient safeguard in closed hearings for measures such as control orders. Lord Bingham held that "the concept of fairness imports a core, irreducible minimum of procedural protection".⁶⁷⁴ The majority found that s3 HRA 1998 and Article 6 ECHR should be relied on to 'read down' the CPR so that courts should ensure that the proceedings overall were fair, which will continue to apply under TPIMs and ETPIMs (Walker, 2013; Fenwick, 2013). In the *A v UK* the Grand Chamber of the ECtHR held that the special advocate was a safeguard, although it could not be invariably relied upon alone and there had to be sufficient information disclosed to the suspect. The court held this to be a protection under Article 5(4) ECHR to ensure that the suspect is "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate."⁶⁷⁵ The court indicated that Article 5(4) did not impose "a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances".⁶⁷⁶ However, in light of the fact the "impact of lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights",⁶⁷⁷ Article 5(4) rights were found to import substantially the same protections as given under Article 6(1) in the criminal aspect.

Following this decision and in light of it, the House of Lords dealt with *AF (No3)* in which the court held under Article 6 the suspect should similarly be given sufficient information to

⁶⁷³ *A v United Kingdom* (fn 293).

⁶⁷⁴ *Ibid* [43].

⁶⁷⁵ *Ibid* [220].

⁶⁷⁶ *Ibid* [203].

⁶⁷⁷ *Ibid* [217].

provide adequate instructions to his special advocate, which became known as the ‘AF Principle’ (Ip, 2012). The House of Lords spent time in the case trying to differentiate between *A* and *AF (No3)*, in view of the government’s contention that the control order regime was sufficiently different and would allow a more lenient approach (see paragraph’s 57, 82 and 111-112 per Lord Phillips, Lord Hope and Lord Brown respectively). It was argued that *A* dealt with circumstances in which deprivation of liberty were caused, whereas in *AF (No3)* the former regime was intended to restrict not deprive liberty as discussed earlier in this chapter and in Chapter Three. Nevertheless, it was found (reluctantly by some Law Lords, most notably Lord Hoffman) that since Article 6(1) applied, and applying *A v UK*, the suspect should be able to know of the ‘gist’ of the case against him. Thus *AF* made it clear that the requirement of a core irreducible minimum of disclosure would be applicable to "light touch control orders" (Ip, 2012). It therefore follows that this *AF* Principle applies to TPIMs as the replacement of control orders, which was confirmed by the Home Office whilst the TPIMB 2011 was passing through Parliament,⁶⁷⁸ and which became a concession made into law in *Secretary of State for the Home Department v BM*.⁶⁷⁹

It is clear that to ensure that safeguards, including the provision of special advocates, are Article 6 compliant within counter-terrorism measures such as TPIMs Suspect must have sufficient information to challenge or defend the case against him; Lord Kerr dissenting in the *Tariq* case, stated:

"A function of the counterbalancing measures is to ensure that the very essence of the right is not impaired. It is, I believe, important to have a clear understanding of what is meant by essence of the right. If equality of arms lies at the heart of a fair trial, the essence of the right must surely include the requirement that sufficient information about the case which is to be made against him be given to a part so that he can give meaningful instructions to answer that case."⁶⁸⁰

In considering "the core irreducible minimum entitlement"⁶⁸¹ Lord Kerr gave careful consideration of ways in which disclosure can be complied with to meet this requirement and

⁶⁷⁸ House of Lords (fn 534).

⁶⁷⁹ *SSHD v BM* (fn 644) [2742] (Mr Justice Collins).

⁶⁸⁰ *Home Office v Tariq* (fn 672) [118].

⁶⁸¹ *Ibid* [119].

meet the protections of Articles 5 and 6, although in his opinion there should be no circumstances in which disclosure should be minimised or withheld:

"Whether a hearing should be conducted in private or in open session; whether information about the case against an individual should be provided by way of full disclosure or by redacted statements or in the form of a summary or gist; whether witnesses should be anonymised – all of these are variables to which recourse may be had in order to reflect the context in which the requirements of Article 6 must be examined."⁶⁸²

Lord Kerr's opinion on fairness also extended to the *Al-Rawi* case in which it was his opinion that "[t]he right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. Without it, a trial between opposing parties cannot lay claim to the marque of judicial proceedings."⁶⁸³

Since *AF (No3)* the ECtHR in *Kennedy v United Kingdom*,⁶⁸⁴ and the UK Supreme Court in the *Tariq* case, Article 6 does not give a right to minimum disclosure in all circumstances. As a consequence, the *AF* Principle is still relevant at the very least to measures such as TPIMs. As mentioned in Chapter Three, in *AT v Secretary of State for the Home Department*⁶⁸⁵ it was alleged that AT was still a significant and influential member of the LIFG and the case related to the assessment of fairness under Articles 5(4) and 6 ECHR. At the appeal to the Court of Appeal from the ruling of Mitting J, Carnwarth LJ endorsed the application of the ECtHR test in *A* and elucidated in *AF (No3)* by the House of Lords. However, applying the principle, he came to a different conclusion. It was found that the allegation that the suspect remained an influential member of the LIFG was a justification for placing the suspect on a control order; there was no evidence within the open material to support this assertion and was based in the closed material. The court held there had not been adequate disclosure and the appeal was upheld.

Nevertheless, the *AF* Principle has not been incorporated into the TPIMA 2011 (Ip, 2012). It is possible that the government may attempt to argue that given that TPIMs are less

⁶⁸² Ibid.

⁶⁸³ *Al-Rawi v The Security Services* (fn 667) [89].

⁶⁸⁴ *Kennedy v United Kingdom* [2010] Crim LR 868; [2010] ECHR 682.

⁶⁸⁵ *AT v SSHD* (fn 290).

restrictive and onerous than the former regime, the *AF* Principle will not apply (Joint Committee on Human Rights, 2010-2012b; Home Office ECHR Memorandum, 2011b:36-38; Ip, 2012). As Fenwick (2012b) explained to a Joint Committee at Parliament, Article 6 could be breached for a lack of disclosure,⁶⁸⁶ which the legal challenge history of the former regime illustrates. Further to this, there may be concern that if Ip (2012) is correct in his assessment of the government's intention to remove the need for disclosure because TPIMs are to be less evasive and onerous, then it is highly possible that the matter will be litigated over again. As mentioned earlier in this chapter, it was correctly remarked by Fenwick (2012b) that the former regime had not been legally challenged in the Strasbourg Court; therefore it had never been given a "clean bill of health"⁶⁸⁷ there. It is highly possible however, that if the government try and rethink ways to prevent the need to disclose information, the TPIM scheme will end up being vetted by Strasbourg. If this happens then the government faces the risk of having to be told by Strasbourg to reconsider counter-terrorism measures of this kind.

RISK ASSESSMENT AND ITS RELATIONSHIP WITH TPIMS

In Chapter Three it was discussed that risk assessment performs a vital role in supporting arguments to establish a breach of human rights; such holistic based assessments assist in determining whether a measure is a proportionate response to the threat. By using risk assessment to analyse the former regime, a detailed examination can be given to the TPIM and ETPIM schemes given that it is similar to the former regime. In Chapter Three, discussion of risk related to the impact of a control order on suspects' families and friends, which was known as 'collateral impact' (Zedner, 2007b), and the (broadly) deferential conduct of the courts towards the government's assertions under the former regime, were considered. These areas were examined as it was argued that they assisted in raising concerns that the former regime risked causing human rights breaches and harm to UK policies on counter-terrorism, an assessment that will be considered in more detail in Chapter Six.

The main consequence of these risks, aside from the argument that human rights were being breached such as Article's 5 and 6, was that terrorist organisations would use the UK counter-

⁶⁸⁶ Fenwick (fn 517).

⁶⁸⁷ Ibid.

terrorism measures to support their campaigns to radicalise vulnerable individuals and entice them to join or support the organisation in some way. When considering the risks of such collateral adverse impact, it has become apparent that the courts are taking this into consideration as a factor when determining deprivation of liberty, although this has been more so towards the end of the former regime. In *CA v Secretary of State for the Home Department*⁶⁸⁸ Mitting J had taken into account the family circumstances caused by the control order, specifically the relocation obligation imposed upon CA and its effect on his marriage. In the CA case Mitting J did not find a breach of Article 5; however, he upheld the applicant's appeal to remove the relocation obligation under the control order. The reason for this is outlined earlier in this Chapter and it takes into account the impact that part of the order will have upon the suspect and his connections. Since then the courts have begun to consider the 'exit strategy'⁶⁸⁹ which is consideration of what happens after a TPIM has ended. It is achieved by allowing suspects to live as much of a normal life as they could under a TPIM, to aid in de-radicalisation, as confirmed in *Secretary of State for the Home Department v AM*.⁶⁹⁰

The AM case raises a question about the Secretary of State's judgment and decision-making process when considering which obligations to impose. This case demonstrates that the Secretary of State did not consider alternative factors before selecting which obligations to impose, which is a poor assessment of risk on the Secretary of State's part. This strengthens the argument that, as the decision-maker, the Secretary of State should be held accountable by the courts for imposing a TPIM and its obligations. The case itself also demonstrates that the court can act independently and consider the measures imposed against the suspects, therefore should consider the measures themselves; although it should be recognised that the TPIMA 2011 seeks to limit judicial involvement just as the PTA 2005 did. Anderson QC would disagree, having stated that the TPIM scheme is "highly judicialised".⁶⁹¹ There are some that believe that the Secretary of State is best placed to make these decisions, whether or not the court or academics agree (MacDonald Report, 2011: paragraph 40-41).

⁶⁸⁸ CA v SSHD (fn 57).

⁶⁸⁹ SSHD v AM (fn 604) [30].

⁶⁹⁰ Ibid.

⁶⁹¹ Joint Committee on Human Rights (fn 81).

There is concern that the imposition of measures like TPIMs create significant adverse consequences for the physical and mental state of the suspect; the Joint Committee on Human Rights (2009-2010a) explained that obligations such as the relocation obligation caused a link to the poor mental health of suspects. Despite this, Glees (2012) when giving evidence before a Joint Committee at Parliament stated: "I do not believe that civil liberties and liberty generally are undermined by effective, proportionate and accountable intelligence-led security policy."⁶⁹² It is contended that this argument is difficult to support given that the impact that the obligations can have upon the suspect and their families. Furthermore, TPIMs are an intelligence-led measure, thus miscarriages of justice may occur.

A fragmented intelligence-led process with little judicial intervention

A lack or fragmented intelligence can impact on the way counter-terrorism measures are used, s44 (see Chapter Two) demonstrates that investigative policing becomes harder when intelligence gives a lack of direction or focus. Instead, measures can be used against a wide number of people for this same reason. Whilst a TPIM may only be imposed against a small number of people, given that only 52 people were subjected to a control order, the risks that follow from being placed under a TPIM are worrying in the long term. What remains concerning is the continued lack of judicial involvement, lack of information as to the case against the suspect and the impact of the measure and obligations on the suspect and their family. The courts are again being used as a formality; the Secretary of State's decision-making process is not being questioned fully by the courts when a TPIM can be imposed. The risk here is that the information which the Secretary of State is basing their information on to impose TPIM obligations is not necessarily complete and therefore mistakes can be made in the information itself or the way in which it has been gathered or used (eg evidence obtained by torture from other states). Like control orders, TPIMs and ETPIMs are both a pre-emptive and preventative measure, although due to its characteristics of looking at the risk or threat posed coupled with the uncertainty of it, the precautionary nature of the evidence and prudentialism within the overarching aim of achieving security (Zedner, 2007b), creates a measure that is mainly a pre-emptive one, despite being named a 'preventative measure'.

⁶⁹² Glees (fn 348).

Knowing that pre-emptive measures characteristically look at a range of factors in order to calculate risk the subject matter [‘the suspect’] poses, which may include a form of profiling, this can mean that the intelligence that is relied upon may be invalid, inaccurate or unsafe. It becomes vital that the intelligence is accurate in order for it to be relied upon; yet the example of Cerie Bullivant which was discussed in Chapter Three, illustrates that weak and unfounded intelligence has been used to impose security measures against British citizens. Imposing a TPIM upon a person requires a level of risk assessment by the Secretary of State, but the nature of the intelligence may stray into the realms of uncertainty and as a result leads to entities [the Secretary of State] engaging with risk avoidance which leads to the limitation of freedoms of others in the name of ‘security’ (Ericson, 2005).

A solution for this is disclosure of the case against the suspect and the ability to provide full instructions to their legal representatives. Without this, the government will have the power to represent their assertions and provide the court with what they view as supporting evidence in closed hearings, whilst the suspect will not be able to do this nor give sufficient instructions to address all of the points the government raises; as identified in the *AF* case. The risk that inaccurate intelligence may be used to support the government in this fashion should support the argument that measures such as TPIMs may give rise to breaches of Article 6.

One worry about some of the intelligence that may be used as ‘supportive’ evidence to secure a TPIM is that it may have been obtained by torture. This particular issue was discussed at length in Chapter Four, specifically over the deportation matters and the cases concerning Abu Qatada. The main issue in most of the Abu Qatada cases was that the government needed to obtain assurances from the Jordanian government that evidence that had been obtained by torture would not be used in his trial upon his return. It may be speculated that most suspects under a control order or a TPIM will not know the source of the evidence against them; therefore they are most likely unable to know or confirm that the evidence being used has been obtained by torture outside of the UK. This was the crux of Abu Qatada’s cases which is part of the reason why it has taken so many years to deport him. The

case of *Gafgen v Germany*⁶⁹³ confirms that admission of evidence obtained by torture would be a 'flagrant denial of justice'. However, the Court of Appeal in *A v Secretary of State for the Home Department*⁶⁹⁴ explained that control orders did not amount to the determination of a criminal charge, but that Article 6 would be activated by them in its civil form. If evidence obtained by torture is used to enable the Secretary of State to formulate grounds so that a TPIM may be imposed upon a suspect, this would backtrack on the core values of the UK which are to "guarantee basic human rights: life, security, the rule of law" (Bulley, 2008). Furthermore, it would also exacerbate the on-going issue of suspicion over the measure created by the former regime.

As explained in Chapters Two and Three, a lack of information gives rise to suspicion (Aradau and van Munster, 2008) which is known as 'consciousness-raising' or 'unintelligibility'. The suspicion would not just be related to the source and contents of the evidence but it would also raise suspicion of the government and judiciary. Unintelligibility, as explained in previous Chapters, is the "the absence of information [which] becomes regarded as suspicious in itself".⁶⁹⁵ Whilst it is widely understood that intelligence information cannot be made publically available for various reasons, including the sensitivity of the information, it becomes more important to ensure that human rights are protected and the Secretary of State is being held accountable for the decision to impose restrictive measures. This also goes to the heart of Salter's (2010)⁶⁹⁶ remark about securitization:

"We do not push the demand so high as to say that an emergency measure has to be adopted, only that the existential threat has to be argued and gain enough resonance for a platform to be made from which it is possible to legitimize emergency measures."⁶⁹⁷

In other words, it comes down to scrutiny; it is important to scrutinise the decision makers [Secretary of State, Police and Security Service], the decisions they make [to impose a TPIM and the specific obligations within it] and to do so fairly. The danger as understood by Buzan *et al* (1998) and Bright (2012) is that securitization can construct a supportive argument

⁶⁹³ *Gafgen v Germany* (fn 444).

⁶⁹⁴ *A v SSHD* (fn 255).

⁶⁹⁵ Susan Coutin 'Subverting Discourses of Risk in the War on Terror' in Amoore and de Goede (fn 5) 227.

⁶⁹⁶ Salter (fn 252).

⁶⁹⁷ Buzan, Wæver and de Wilde (fn 209) 25. Also see: *Ibid*.

surrounding a security threat in order to control "any type of rule"⁶⁹⁸ such as human rights' obligations.

A solution to deal with the issue of inaccurate or fragmented intelligence being used to support the government in obtaining a TPIM, may be through the independence of the court and its ability to scrutinise the measures being imposed without restrictions. This would enable the judiciary to assess the evidence as it was presented to the Secretary of State and ensure that if a security measure should be imposed then it would be proportionate. A concern for government would be that the judiciary have made rulings that have impacted upon the government's counterterrorism strategies, for example the *Belmarsh* case, which have resulted in government imposing new legislation which is still seen as repressive (Zedner, 2007b). Therefore limiting judicial involvement enables the government to continue with its counter-terrorism measures. Alternatively, the Secretary of State should be held fully accountable for the decisions made to impose a TPIM allowing the court to scrutinise the grounds on which a TPIM is being imposed, and assess the proportionality of each obligation imposed, rather than simply assessing whether the Secretary of State's decision was flawed.

Whilst the Secretary of State does not have to explain the basis being relied upon to secure a TPIM initially, the 'lite' touch nature of the measure with relaxed restrictions on the use of telecommunication allows some potential for terrorist networks to be exposed or identifiable, although this is purely academic speculation. The only way this may be understood to work is whether prosecutions follow the imposition of TPIMs. The main risk awaiting the government at the end of the maximum two-year period for a TPIM, as explained by Fenwick (2012b) is that the suspect may "just sit on that TPIMs and not engage in any terrorism-related activity, which is not very surprising, but still remain radicalised. ...at the end of that time, the question would be: what could happen?"⁶⁹⁹ The suspect may re-engage with terrorist activity and commit an act of terrorism, or due to the negative impact of the measure and its obligations, find it impossible to re-integrate with their community. This means that securing a conviction following the imposition of a TPIM is important.

⁶⁹⁸ Bright (fn 203) 866.

⁶⁹⁹ Fenwick (fn 517).

Securing prosecution

The implementation of TPIMs gives rise to rigorous review and assessment by the 'Terrorism Review Group' (henceforth 'TRG')⁷⁰⁰ to increase the possibility of prosecuting terrorist suspects who are under the scheme, as per s10(5) TPIMA 2011. Middleton (2011b) describes a sense of cynicism towards this 'strengthened duty' to keep the possibility of prosecution under review in these terms: "we did this under the old system, but we really mean it [this time]".⁷⁰¹

It is important to note that the statute does not specifically confirm how regularly the TRG must review the active TPIMs, save to say that it is to be "kept under review throughout the period the TPIM is in force".⁷⁰² In the quarter between 1st March 2013 and 31st May 2013 the Home Office (2012c) confirmed that the TRG did "not meet during this reporting period",⁷⁰³ so what is meant by regular? The former regime was found to "undoubtedly" result in some terrorists and their activities going unpunished, which Lord MacDonald described as "a serious and continuing failure of public policy".⁷⁰⁴ The House of Lords Select Committee on the Constitution (2010-2012) found that the TPIMs is a "degree closer to the criminal justice system",⁷⁰⁵ identifying s10(5) TPIMA 2011 as an example. Identifying and monitoring terrorist networks by detecting the 'in-degree and out-degree centrality' as well as 'betweenness' of networks, is important in the evidence and intelligence gathering process aimed at securing a conviction. It is explained by Striegheer (2013) that "the life-blood of intelligence is information".⁷⁰⁶

⁷⁰⁰ The Terrorism Review Group is made up of the Home Secretary, the Security Services and the Crown Prosecution Service. Its introduction under the Terrorism Prevention and Investigation Measures Act 2011 replaces the Control Order Review Group ('CORG') which operated under the former control order regime.

⁷⁰¹ Middleton (fn 533).

⁷⁰² Terrorism Preventative and Investigation Measures Act 2011, Section 10(5)(a).

⁷⁰³ Home Office (fn 550).

⁷⁰⁴ MacDonald Report (fn 23).

⁷⁰⁵ House of Lords Select Committee on the Constitution 'Terrorism Prevention and Investigation Measures Bill' 2010-2012 Nineteenth Report (15th September 2011), HL 198.

⁷⁰⁶ Jason-Leigh Striegheer 'Early detection of the lone wolf: advancement of counter-terrorism investigations with an absence or abundance of information and intelligence' 2013 *Journal of Policing, Intelligence and Counter Terrorism* 8(1): 35 – 53, 37.

It is noteworthy that the intelligence gained from analysing terrorist networks cannot be used on a solo basis as the information obtained can be problematic, as Krebs (2002b),⁷⁰⁷ Fellman and Wright (2004)⁷⁰⁸ affirm with reference to the work of Sparrow (1991).⁷⁰⁹ There are three identified problems with analysing a network, which one would suggest is similar in terms of analysing terrorist networks:

1. Incompleteness – the inevitability of missing information, connections and links that the investigators will not uncover;
2. Fuzzy boundaries – the difficulty in deciding who to include and who not to include. It is important to recall that pre-emptive action requires assessment and identification of the 'suspicious' from the 'normal', the 'risky' from the 'at risk' (Edkins and Pin-Fat, 2004; Amoore and de Goede, 2008);
3. Dynamic – these networks are not static and are constantly changing and adapting. To counter the problem of looking for the existence or absence of a link between individuals, Sparrow suggests looking at the strength of a tie between individuals at the time and the task at hand; this being another process of pre-emptive assessment and identification.

These problems are exacerbated due to the current rise in 'lone wolf', semi-impromptu attacks, such as the murder of Lee Rigby in 2013 or the Boston Marathon bombing. The difficulty that arises from the former regime and TPIMs is the fact that the suspect has knowledge that they are being monitored. By knowing that they are subject to such measures they are more likely to alter or curtail their behaviour whilst subject to the measure; this would explain why prosecutions have not been successfully brought against those under the former regime; neither the Security Service or the Crown Prosecution Service could find any evidence capable of securing convictions, as explained by David Anderson QC to the Joint Committee on Human Rights (2012-2013b):

"...I would say is that the picture looks pretty much the same. People are looking. They are not finding very much. I find that completely unsurprising because, if you tell people that they will be free of all constraint within two years, then most people, if they are rational, will

⁷⁰⁷ Krebs (fn 590).

⁷⁰⁸ Phillip Vos Fellman and Roxana Wright 'Modeling Terrorist Networks: Complex Systems at the Mid-Range' 2004 *The Intelligencer – Journal of US Intelligence Studies* (Winter/Spring) 14(1) <<http://www.cs.unibo.it/~ruffino/Letture%20SNA/FellmanWright.pdf>> accessed 21st December 2013.

⁷⁰⁹ Malcolm Sparrow 'The applications of network analysis to criminal intelligence: An assessment of the prospects' 1991 *Social Networks* 13: 251-274.

keep their heads down even if they might otherwise have been inclined to indulge in terrorism-related activity."⁷¹⁰

A network does not just span the internet and telecommunications, but is relevant to the physical network and connections. Whilst the TPIMA 2011 retains the right to restrict a person's ability to associate with other people, such restrictions again may impact upon the 'terrorist network'. The problem here is two-fold: firstly, an obligation restricting a person from associating with others can indirectly impact upon the evidence and intelligence gathering process; secondly, such an obligation can negatively, and indirectly, impact upon the family of the suspect.

The impact on others and social isolation of the suspect under a TPIM

Given that TPIMs are deemed to be control orders in all but name (Middleton, 2011b), it is expected that just like the former regime TPIMs will have a negative impact upon the suspect and their family. In Chapter Three reference was made to Cerie Bullivant (a former controlee) who explained the isolation he suffered under the former regime. The Joint Committee on Human Rights (2005-2006b) explained that the negative impact upon the family of the suspect, under the former regime, created shame, trauma and uncertainty because the "family is now subject equally to the restrictions"⁷¹¹ imposed against the suspect. As a consequence "[t]he families believe themselves...to be stigmatised and isolated from society, to be no longer able to enjoy privacy or security within their homes without fearing at every moment entry by the police or disruption from telephone calls especially throughout the night, and an atmosphere of fear and apprehension that is constant'.⁷¹²

Given that the Secretary of State can impose obligations that result in the police making unannounced searches of the property, a family member of the suspect may be stigmatised by the TPIM being imposed. Having to inform the police and Security Services of any friends coming to the property, so that the suspect does not breach any imposed restriction to

⁷¹⁰ Joint Committee on Human Rights (fn 81).

⁷¹¹ Joint Committee on Human Rights (fn 59).

⁷¹² Ibid.

associate with others; will result in the suspects family continuing to suffer as they did under the former regime. Farthing (2012) explained to a Joint Committee in Parliament that the TPIM "remains a punishment without the person who is being subject to the measure, and inevitably their family members who are also suffering because of the measures that are imposed, never knowing the details of the case against them." ⁷¹³

The Cerie Bullivant example and the remarks made by the Joint Committee on Human Rights clearly identify the negative impact that others suffer as a consequence of the obligations imposed upon the suspect. The *CF* case⁷¹⁴ demonstrates that the Secretary of State has not risk-assessed the threat posed by *CF* and then determined whether the obligations imposed are proportionate. As a university student, the Secretary of State's imposed obligation to restrict *CF* associating with people, meant that he was unable to associate with people academically or socially as one would expect in the normal life of a student. This was in conflict with the principle of imposing restrictions but allowing the suspect to lead a relatively normal life, as discussed in the *AM* case.⁷¹⁵ Collectively this demonstrates that the risk stems from use of disproportionality onerous obligations by the Secretary of State. Therefore it is important that when deciding to impose a TPIM the Secretary of State should consider the longer term risks, such as the impact on the health of the suspect and their family and the possibility of radicalising the suspect (if they are not already radicalised).

Radicalisation

The impact of measures such as TPIMs, and the continuous development and implementation of executive counter-terrorism powers which provide conflicts with human rights, particularly Articles 5 and 6, coupled with the risks caused by such measures, is a continuous "short circuiting of due process by the need to 'defeat' terrorism (Livingstone, 2013). As Fenwick (2012b) explained, the TPIMs and ETPIMs "could be part of a narrative of radicalisation".⁷¹⁶ The greatest risk that may be caused as a result of powers, such as TPIMs,

⁷¹³ Farthing (fn 523).

⁷¹⁴ *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin).

⁷¹⁵ *SSHD v AM* (fn 604).

⁷¹⁶ Fenwick (fn 517).

is radicalisation of suspects. One may suggest that there are two classifications of radicalisation:

- (1) Those that are already radicalised before the TPIM is imposed against them; and
- (2) Those that are radicalised after the TPIM is imposed.

If the former classification applies, then the consideration for the TRG is the exit strategy to de-radicalise the suspect if they are unable to prosecute. However, it is known that there is not enough evidence that de-radicalisation occurred under the former regime; therefore it is likely there will not be such evidence from reliance on TPIMs. If the latter classification applies the concern is that the counter-terrorism measure that is intended to pre-empt and prevent terrorism, as well as provide national security, actually creates terrorists. When considering the statement of CA's wife when giving evidence:

"Any shuffling outside our front door, any slight movement filled me with dread, the heart sinking feeling experienced during three previous early morning raids. This is something our first-born struggles with. If he hears a police car, if he sees men in suits and officers in the house he begins to get upset and frightened that they will 'take daddy away'"⁷¹⁷

Thus the child who might otherwise be unlikely to be radicalised has to live with this sort of fear. The impact of TPIMs on children was an area of discussion by the Joint Committee on Human Rights (2012-2013b), particularly by Baroness Berridge, when receiving evidence from David Anderson QC on the 13th March 2013; unfortunately this particular risk was one that David Anderson QC did not assess for his report. CA's wife explained the impact that obligations imposed upon her husband under counter-terrorism measures had on her eldest child: "[the] hopelessness, anguish and extreme anxiety manifests itself in constant arguments, loneliness and in the case of our eldest child who had just turned four, Post-Traumatic Stress Disorder".⁷¹⁸ In Chapter Two there was discussion about the importance of perception of the police and of emanations of the state. There is a possibility that being indirectly subjected to the obligations under a TPIM imposed upon a parent will create resentment and a negative perception in children towards the police, Security Services, government and society etc. In other words, these powers may potentially create terrorists of

⁷¹⁷ CA v SSHD (fn 57).

⁷¹⁸ Ibid.

the future. If this is so one may argue that the measures become disproportionate and ineffective.

The ultimate concern is that if the risks identified in this chapter and in Chapter Three apply to executive counter-terrorism powers such as TPIMs, the alarming consequence is that UK laws and policies to counter-terrorism might actually aid in creating disillusioned communities and might promote opportunities for terrorism to expand. The impact of powers such as control orders and TPIMs mean that they may lead to individuals being, or feeling as though they are being, deprived of an identity and rejected as a part of humanity (McGhee, 2008). The behaviour by government to protect 'our' interests creates an indifference that affects others which becomes acceptable. As Dworkin (2002) and McGhee (2008) explain, placing the security of the majority over and above the rights of others, means that we jeopardise a fundamental moral principle: the 'principle of shared humanity'.

By undermining the humanity of suspects under schemes like TPIMs individuals are excluded by no longer being recognised as human, which in turn results in the removal of human dignity (Balibar, 2004; McGhee, 2008). This 'dehumanization' is seen via the removal of or restrictions imposed upon suspects' human rights, most notably under Articles 5 and 6 ECHR. Agamben (1998) advises people to be cautious of the 'metamorphoses' of this due to the 'hidden matrix of the politics'. In other words, there is a political game involved which everyone should be wary of, which is exemplified by the introduction of the Closed Material Proceedings ('CMP') in civil cases relating to TPIMs and potentially ETPIMs.

CONCLUSION

The enactment of the TPIMA 2011 was an opportunity for government to start afresh and implement an executive counter-terrorism measure which would take into account the array of legal challenges and criticisms held against the former regime. Some of the identified differences between the former regime and the TPIMs include: the relaxation on the use of telecommunications; use of relocation obligations being available only under the proposed ETPIMs; the introduction of the time limits; and the change to the standard of proof which it

is believed will make little difference (Middleton, 2011b). Anderson QC (2014) explained that there have been 10 suspects subject to TPIMs, 9 of which were originally on a control order. Ultimately, Anderson QC (2014) believed there was a need for TPIMs and accepted they had disrupted terrorism; although there had been no criminal convictions on the back of TPIMs for terrorism. Furthermore, despite no new TPIM notices being introduced for over 18 months, Anderson does not alter the opinion that the scheme is an effective counter-terrorism measure.

It would appear that the TPIM scheme is intent on reinforcing the importance of intelligence and evidence gathering and by keeping the matter under review on attempting to secure a conviction. This is despite the same stance being legislated for under the former regime which produced no convictions. Middleton supports many of the changes that have been brought about under TPIMs, yet finds that the time limits do not represent a 'real effort' of change; furthermore, he considers that the time limit, together with the relaxation of telecommunications restrictions and removal of the relocation obligation, were all workable under the former regime (ie it could merely have been amended). From this it is argued that the reason for introducing the TPIMs is one of political advantage - by applying the TPIM standards and practices under the former regime there would not have been a "politically spectacular" change compared to repeal of the controversial legislation and introduction of an entirely new system. This is indicative of a rebranding strategy, in other words, it is politically motivated, as McSherry et al (2009), de Londras (2011) and Zedner (2014) argue.

Suggesting that the balancing of national security and human rights in terrorism situations is politically based supports the remark made by Lord Bingham in the *Belmarsh* case⁷¹⁹ which has been referred to in this thesis. This can refer centrally to a matter of accountability; there are some who consider that there should be both political and judicial scrutiny of the facts of each case and the Secretary of State's decisions to impose a security measure upon suspects, such as TPIMs (de Londras, 2011). On a political level this may be achieved through debate in Parliament and evidence being given before Parliamentary Committees (eg the Joint Committee on Human Rights). On a judicial level scrutiny may be achieved through the use

⁷¹⁹ A and Others v SSHD (fn 24).

of "expert tribunals" such as the Special Immigration Appeals Commission (*Othman v Secretary of State for the Home Department*).⁷²⁰ The risk of placing reliance on these levels of scrutiny relates to deferential attitudes: open discussion of intelligence in Parliament is unlikely to be supported for the same reasons as having closed material hearings. This would mean any Parliamentary debate or discussion would result in acceptance of any assessment made by the Secretary of State because the intelligence which gives foundation to their decision could not be made public. On a judicial level, the judiciary in domestic courts, including SIAC, has seen support given to the decision and assessment of the Secretary of State, unless the power to scrutinise the Secretary of State is not limited by government through legislation. In either situation the suspect is still not guaranteed any of the protections given to those under the criminal justice system and whilst the TPIM scheme is considered a "degree closer to the criminal justice system",⁷²¹ it still remains separate and running parallel to the criminal justice system.

As a consequence of remaining separate from the criminal justice system there are issues of human rights being breached, particularly Articles 5 and 6. Whilst on a domestic level the courts have not found such breaches, in the sense of condemning the schemes wholesale (and issuing s4 HRA 1998 declaration), despite the fact that measures such as TPIMs and the former regime are coercive measures; as seen under the s44 TA 2000 powers. Coercive elements to counter-terrorism measures can contribute to causing a deprivation of liberty. The discussions of risk assessment continue to show that by assessing the measures holistically, it is possible to determine whether the measure is effective and ultimately a breach of human rights.

This Chapter has established that the TPIM scheme raises the same human rights issues and risks as the former regime. It is also important to recognise that TPIMs and control orders are predominately pre-emptive measures rather than preventative ones. The s44 measure (as discussed in Chapter Two) was aimed at disrupting, deterring and preventing terrorist activity, whilst TPIMs are aimed at controlling and curtailing the behaviour of suspects

⁷²⁰ *Othman v SSHD* (fn 379).

⁷²¹ House of Lords Select Committee on the Constitution (fn 705).

before the threat they pose emerges or until such time the government can do something with them, for example deport or prosecute them.

The main similarity between TPIMs and s44 is that neither measure requires that the power can only be invoked at a time of necessity or when there is a threat of imminent danger. Just as the former regime did, TPIMs give rise to concerns as to the long-term impact of such powers. It is confirmed that as a power of securitization, it can de-humanise people through the measures imposed, which in the long term through resentment and fear may result in radicalisation. There remains concern that those under a TPIM or their families would be open or vulnerable to radicalisation; as Fenwick (2012b) remarked "it could be part of a narrative of radicalisation".⁷²² In turn these radicalised individuals fit into one of the three-tier model groupings as identified by the JTAC, as discussed by Irons (2008). The *AM* case discusses the identification of an exit strategy. *Prime facie* this seems to present a potential way of reducing the risk radicalisation may create, although case law has demonstrated that the Secretary of State fails to adopt this approach when considering which obligations to impose, for example the *CF* case. Also there is the need for the suspect to lead as 'normal a life' as possible when a TPIM is imposed against them; as discussed case law demonstrates the Secretary of State's failure to take this into consideration before imposing a TPIM. This failure was also seen under the former regime as demonstrated in *AR v Secretary of State for the Home Department*⁷²³ where AR was refused permission to attend AS level Chemistry and Biology classes due to "national security concerns relating to access to material and opportunities to develop understanding and knowledge in areas that could be used for terrorist-related activity",⁷²⁴ despite AR's ambition to go to university and medical school. Furthermore, inputting an exit strategy under a TPIM is not a statutory requirement under the TPIMA 2011, underlining its status as a political discretionary power.

There are two main areas of contention in the spheres of human rights and risk assessment. Firstly, there are issues surrounding disclosure and the suspect's right to know the case against him and his accusers, as per Article 6. On a domestic level the courts have ruled that

⁷²² Fenwick (fn 517).

⁷²³ *AR v Secretary of State for the Home Department* [2008] EWHC 1743 (Admin).

⁷²⁴ Bright (fn 203) 875.

measures of this kind are not criminal proceedings; but nevertheless the guarantees under Article 6(1) apply. Secondly, there has been wide discussion on deprivation of liberty. In legal challenges towards the end of the former regime's life the courts opened up to the risk assessment of other factors including the impact on family; however, this assessment was not to find the Secretary of State's decision flawed, but rather emphasised the importance of being proportionate. The TPIMA 2011 does not expressly take into account the rulings of various legal challenges, most notably *A and Others* and *AF(No3)*. As a result, one would agree with Fenwick (2012a; 2012b; 2013) that the matters of deprivation of liberty and disclosure may be re-litigated and until the matter is litigated in the ECtHR and possibly given a clean bill of human rights health, it will always be prone to legal challenges.

It has been widely welcomed that the TPIMs is closer to the criminal justice system than the former regime. In Chapter Three there was discussion about reforming bail to use the system to control and manage terrorist suspects. Given that TPIMs demonstrate that it is not just about the power itself, but the implementation of that power which can make it controversial, this indicates that even a reform of bail could cause controversy. The positive aspect of reforming bail is that the suspect would automatically be within the criminal justice system. Unlike the former regime, TPIMs aims at prosecuting and convicting suspects where possible. The main issue as identified in this chapter relates to detection of the network of suspects. Unlike the former regime the blood supply of terrorist networks is not cut off; however, under the new TPIM scheme the suspect is still aware that they are being monitored as under the former regime. The risk is that the suspect would then alter their behaviour and wait for two years before continuing to engage in terrorist activity. Farthing (2012) explained that the most effective way of gathering evidence is to not let the suspect know they are being monitored.

By monitoring a suspect and not informing them of this, a suspect will act naturally and may unknowingly disclose their in-degree and out-degree centrality terrorist network. This would ensure that the Security Services and Crown Prosecution Service, or the TRG as a whole, do not miss out on obtaining evidence that can be used at trial sooner rather than wait two years or more (if ever). It would also mean that human rights breaches would be less of an issue other than igniting an Article 8 ECHR discussion. Ultimately this would support the aim of

trying to secure convictions and would in turn support the Criminal Justice and Human Rights Model as discussed in Chapter One. As Ashworth and Zedner (2010) explained, the prioritisation of prosecution "ensures that terrorist suspects are dealt with under the protections of the criminal justice system".⁷²⁵ This is because by using the criminal justice system one can reassert the fundamental rights of individuals including "the presumption of innocence, due process protections, the requirement of proof beyond reasonable doubt, and the right to a fair trial" which would replace targeted and discriminatory counter-terrorism practices or criminal justice promises (Waldron, 2010; Zedner, 2014). Measures such as TPIMs or ETPIMs may be used at times of emergency, for example when there is an imminent threat of a terrorist attack. Ultimately this would mean that the Security Services would need to be more vigilant and assess the risk posed by suspects more closely.

Given that there may be an alternative way of obtaining evidence and ultimately convicting suspects, one would argue that measures such as TPIMs are disproportionate. This is supported by the assessment given by David Anderson QC when giving evidence to the Joint Committee on Human Rights (2012-2013b) he was asked by Baroness Lister of Burtersett: "...in view of your findings that TPIMs are not effective as investigation measures, is it not a complete misnomer to describe them as such as opposed to pure prevention measures?" David Anderson QC responded: "You could argue that they could not do both, and if they are effective at preventing then it is hardly surprising they are not very effective when it comes to investigation, because there is nothing to investigate. That is effectively how I see it."⁷²⁶ It may be arguable that ETPIMs are not disproportionate to the threat they are aimed at because they are an emergency measure which would be used at specific times, despite the fact that, as mentioned earlier in this chapter, the specific time has not been expressly stated within the TPIMA 2011 or ETPIMB 2013. This follows the same argument under the s44 powers as discussed in Chapter Two, with regard to when an emergency power should be enforced. It therefore remains for Chapter Six to consider whether pre-emptive and preventative measures of countering terrorism are proportionate and effective. Given the matters discussed in this Chapter and preceding Chapters there are issues of great concern, specifically: the ability to scrutinise the decisions reached by the state and its emanations; the accountability of

⁷²⁵ Andrew Ashworth and Lucinda Zedner 'Preventative Orders: A Problem of Under-Criminalization?' in R.A.Duff, Lindsay Farmer, S.Marshall, Massimo Renzo and Victor Tadros (eds) 'The Boundaries of the Criminal Law' (Oxford: Oxford University Press, 2010).

⁷²⁶ Joint Committee on Human Rights (fn 81).

decision-makers, such as the Secretary of State; the politics involved in counter-terrorism measures; the lack of transparency; and the long-term effect of these powers on individuals and the risk they cause to national security.

CHAPTER SIX

THE ASSESSMENT OF UK PRE-EMPTIVE AND PREVENTATIVE COUNTER-TERRORISM MEASURES, THE CONFLICT WITH HUMAN RIGHTS AND THE IMPORTANCE OF RISK ASSESSMENT

CONCLUSIONS

"Civil liberties are a vital part of our country, and of our world. But the most basic liberty of all is the right of the ordinary citizen to go about their business free from fear or terror."⁷²⁷

- Tony Blair MP, former British Prime Minister

INTRODUCTION

UK counter-terrorism law and policy post-9/11 has developed through controversy, legal challenges, Parliamentary action and has been influenced by wide debate both by academics and parliamentarians, as discussed throughout this thesis. Terrorism post-9/11 has been viewed by some as the 'harbinger of a new era of 'super-terrorism' and has resulted in the need for 'exceptional measures' in response to this new era of terrorism (Goold and Lazarus, 2007; Lazarus *et al*, 2013). The threat of terrorism post-9/11 has given the UK a recognised dilemma: what do you do with a terrorist suspect that you cannot indefinitely detain without trial, deport or prosecute due to the need to protect intelligence sources or information-gathering methods (Donohue, 2008)? This dilemma has been exacerbated by the protection of human rights, in practice and in belief. The post-9/11 era has seen a considerable change in attitude by states, not just the UK, to the protection and safeguarding of national interests from terrorism.

The UK government placed emphasis on its changed strategy in relation to counter-terrorism, as seen by CONTEST: 'Pursue, Prevent, Protect and Prepare', which has been reviewed since

⁷²⁷ House of Commons 'International Terrorism and Attacks in the USA' 2001-2002a Hansard (14th September 2001) 372(26): 603-670, 606.

the 2010 general election and was reaffirmed under that review, reasserting the current UK Strategy, published in June 2011.⁷²⁸ The last decade has seen a plethora of innovative policing, intelligence and immigration control techniques as a way of dealing with the threat of terrorism (Lazarus *et al*, 2013).

Each chapter of this thesis provides a detailed assessment of such techniques and measures introduced by the UK government to address the aforementioned dilemma. Similarly, they acknowledge that the current realm of counterterrorism provokes controversy on a human rights level. This thesis has sought also to discuss the relevance and importance of risk and the calculation of risk in respect of those measures employed by the UK, to counter-terrorism. Controversy has arisen around the impact that counter-terrorism measures have had upon liberty in the absence of a trial, conviction or criminal wrongdoing; instead, such measures reflect a move towards a law and policy-making based upon risk and uncertainty instead of guilt (Zedner, 2009; de Londras, 2011).⁷²⁹ One can recognise that there is an executive argument that there needs to be protection of national security and public safety, which is expressed in government publications (see *CONTEST*); this thesis has throughout sought to consider the elements of risk created or alleviated by enforcing or implementing counter-terrorism measures, which relate to the concerns with human rights, as identified in each chapter. As de Londras (2011) explains, there is a balancing approach which identifies a co-existence between rights and security which in turn creates limits to 'individual rights and [gives rise to] security-motivated' state activity (2011: 596). In this chapter the extensive discussion of each measure is collectively brought together to answer the fundamental questions identified within the introduction of this thesis.

Ultimately, this chapter intends to explain and create an understanding that greater safeguards are required when utilising pre-emptive and preventative measures such as those implemented by the UK. In doing so, this chapter will look at the counter-terrorism measures discussed in Chapters Two to Five and at their interlinking pre-emptive and preventative characteristics which were discussed in detail in Chapter One. This chapter will then consider the link human rights have had with the discussed measures, before then examining the wider

⁷²⁸ HM Government (fn 14).

⁷²⁹ de Londras (fn 521).

risks caused by those measures. Before identifying whether pre-emptive and preventative counterterrorism measures, such as those adopted by the UK post-9/11, are:

- (i) proportionate,
- (ii) effective; and
- (iii) whether they support the UK strategy to counter terrorism.

Finally this chapter, bringing together the discussions of the preceding chapters, will conclude that these measures are ineffective, disproportionate and do not support the UK strategy in countering terrorism.

UK PRE-EMPTIVE AND PREVENTATIVE MEASURES OF COUNTER-TERRORISM

This thesis has considered various types of counter-terrorism measure adopted by the UK which operate and behave either pre-emptively, preventatively or via some feature or nature, as a combination of the two. Zedner (2007b; 2009) argues that preventative measures have arisen to avert the risk in the growth of terrorist-related activity; this became recognised as a 'new paradigm in prevention' (Cole, 2006; McCulloch and Pickering, 2009). Consequently, it has been recognised that an 'aggressive preventative agenda' had been adopted by the UK, which Janus (2004) described as 'radical prevention'. It will be discussed later in this chapter that through this approach a 'new paradigm of control and coercion' has been adopted and established itself (Lazarus *et al*, 2013). As discussed throughout this thesis, pre-emptive and preventative actions or decisions are widely based on intelligence; Isaacson and O'Connell (2002) and Cutter, Richardson and Wilbanks (2003) believe that intelligence can be "highly fragmentary, lacking in well-defined links, and fraught with deception".⁷³⁰ This creates a number of risks, including room for doubt about the basis for such actions, given that intelligence may be circumstantial rather than definitive. Pre-emptive and preventative applications work similarly to the 'precautionary principle' under which it would be unacceptable to wait until the level of the threat or harm is fully realised, as previously discussed. Later in this chapter it will be discussed that this causes a moral dilemma for the UK and brings into question whether the adopted measures are proportionate to the threat.

⁷³⁰ Cutter, Richardson and Wilbanks (fn 177).

Ultimately, when a threat or event is uncertain or it is unknown when it will be realised - '*dispositif* of precautionary risk' - it creates visions of a disastrous future (Aradau and van Munster, 2008). In other words, it creates the 'worst case scenario' approach, which for the government can be used to support the need to act before it is too late despite there being a lack of strong evidence or intelligence in place. One risk arising from this situation is that government can create a constant argument of a 'state emergency', which was seen under the rolling-programme of s44 stop and search (see Chapter Two). This precautionary behaviour may also be based upon inaccurate assessments of the probability or likelihood that a threat will come to light, which may stem from previous events and instances rather than necessarily from strong evidence, including intelligence that may have been obtained by means of torture from other states. It therefore follows that any action or decision taken that may or will impact upon an individual's life should be done under tighter controls and safeguards; this thesis argues that this can only be achieved through criminal justice safeguards and protections. The time in which the state acts should be dependent upon the threat posed by the suspect and pre-emptive and preventative action should be taken when the threats posed are imminent and likely to materialise, rather than at an earlier time when the threat is being assumed. This argument will go to the heart of determining whether state pre-emptive or preventative action is proportionate to the threat. The determination and concept of whether a 'state of emergency' exists and its role in answering the three main fundamental points identified will be discussed later in this chapter.

Each of the measures examined within this thesis show that they are not required to be used at any specific time, for example at times when there is an imminent threat of a terrorist attack; this has been identified as one of the concerns under ETPIMs because the ETPIMB 2011 provides no clarification as to when ETPIMs may be activated. Assessing when to enforce any particular measure should impose clear accountability throughout a process; this was one of the main criticisms of the s44 measure which lacked accountability from the Secretary of State to the frontline police officer, as explained in Chapter Two. The safeguard of accountability will be discussed further in this chapter. In each legislative framework which each measure is based upon, there is a failure to provide any specific test to determine when a state of emergency would be deemed to exist, and instead allows this to come from the subjective assessment of the Secretary of State. Each of the considered measures are early interventionist measures, but are recognised as emergency or executive powers, used to tackle

terrorism through control and management of the threat. Initially the UK government was enforcing and enacting counter terrorism measures which eroded or breached human rights in the early stages of fighting terrorism post-9/11. In the later post 9/11 period the UK has introduced counter terrorism measures which have made greater attempts to be human rights compliant, as seen by the two forms of control orders, TPIMs and ETPIMs and use of assurances to deport foreign terrorist suspects.

PRE-EMPTIVE AND PREVENTATIVE COUNTER-TERRORISM AND HUMAN RIGHTS

The counter-terrorism debate has predominately been centralised around the issues of human rights with them being extensively discussed, debated and criticised by human rights campaign groups such as Liberty. It is also important to recognise that s44 stop and search, and the other counterterrorism measures examined in this thesis (Chapters Three to Five) have developed following the *Belmarsh* case: control orders were introduced as a direct result of the judgment, which consequently developed into the current TPIM and ETPIM schemes. Further this judgment impacted upon the development of Deportation with Assurances ('DWA') after declaring that the Part 4 measure breached Articles 14 and 5 ECHR. Each of the measures considered within this thesis have been primarily based around Articles 5 and 6, although some measures may affect other human rights (eg DWA relates more to Article 3). The counter terrorism measures post-9/11 have increasingly mimicked the coercive effects of the criminal law; despite this they have not had to face the same restrictions and protections afforded to suspects in the criminal justice system (Lazarus *et al*, 2013); this has resulted in the development of a counter terrorism justice system and counter terrorism justice model (Walker, 2013).

S44 stop and search is an adaptation of ordinary stop and search police powers, whilst control orders/TPIMs and ETPIMs are adaptations of ASBOs and SOPOs and other pre-emptive and preventative orders seen in the criminal justice system; DWA on the other hand is an adaption of the immigration system. These hybrid measures are generally speaking enforced when the Secretary of State believes that a suspect has been or is involved in terrorist-related activity (Lazarus *et al*, 2013) which requires control or management. Fenwick (2010) and

Walker (2013) have argued that counterterrorism measures post-9/11 have read down the ECHR and some of the basic fundamental rights, including rights of a fair hearing and rights to a private/family life (Articles 6 and 8 respectively). It has been seen that an arguable breach of the qualified rights, such as Article 8, may tip the balance and be of relevance to a breach of other Convention rights such as Article 5 (eg *AP* case); it may also allow the courts to rule on Article 8 grounds rather than on Article 5 ones, as exemplified by *CA v Secretary of State for the Home Department*⁷³¹ and *Gillan and Quinton v United Kingdom*.⁷³²

Each of the UK counter-terrorism measures discussed in each chapter of this thesis have questioned compliance with variety of Convention rights, primarily Article 5 and 6. The introduction of a counter terrorism justice system therefore creates concerns about Convention-compliance. If this system becomes normalized, procedural restrictions initially used in the counter terrorism justice system are likely to overspill into other ordinary justice systems, namely criminal justice and civil justice (Fenwick, 2013). This overspill has been seen through the passing of the Justice and Security Act 2013 and will be likely to be seen in a revised immigration system with upcoming immigration reforms.⁷³³ Some of the more concerning issues of human rights relate to a person's freedom and liberty as protected by Article 5, as well as their procedural rights as protected by Article 6. In relation to these protections there has been a recalibration towards a merely basic/minimal protection via interpretation (Fenwick, 2010). Deprivation of liberty has been re-examined by the domestic courts to distinguish between deprivation and restriction; procedural protections under Article 6 have been read down, and an implied limitation on the automatic right of being innocent until proven guilty has arisen (Article 6(2)). Further to this fair and open/transparent justice has been minimised as witnessed in issues of disclosure and in respect of the judiciary having limited involvement, which offers little protection to human rights because the Secretary of State and decisions made are less likely to be held accountable.

⁷³¹ *CA v SSHD* (fn 57).

⁷³² *Gillan and Quinton v United Kingdom* (fn 15).

⁷³³ Theresa May MP, Secretary of State for the Home Department at the Conservative Party Conference Brighton 2013 <http://conservativepartyconference.org.uk/Speeches/2013_Theresa_May.aspx> accessed 6th June 2014.

Deprivation of liberty caused by UK counter-terrorism measures

The principles of *Guzzardi* have assisted in determining what constitutes deprivation of liberty, which has been discussed within Chapters Two and Five. The *Gillan and Quinton* case is an example of this as it related to the use of s44 stop and search emergency powers of which the House of Lords found that the measures did not deprive a person of liberty under Article 5(1). Although the ECtHR did find the s44 measure to be coercive, it did not ultimately rule on whether a deprivation of liberty had been caused by the measure. The decision that the measure was coercive facilitated the court's conclusion that its use had breached Article 8 because this right covers aspects of physical and psychological integrity and it was found that a suspect would suffer embarrassment or humiliation as a result of use of the measure. This behaviour of reaching a finding under Article 8 as opposed to Article 5 is illustrative of a reading down of rights, arguably a regular occurrence in judicial interpretation in relation to each measure assessed in this thesis.

Detention prevents individuals from engaging in any normal activity; the impact is such that it can prevent a person from travelling, using modern technology, or participating in family or religious activities. Detention of this kind can impact upon a person's sociological, economical and psychological status; this thesis has also demonstrated that such negative impacts can be felt (indirectly) on others associated with a terrorist suspect, usually the family. Reference has been made by some academics (Berks, 2008) to the opinion of US judge Justice Scalia when quoting Blackstone on the value to society of the right to liberty:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest magistrate to imprison arbitrarily whomever he of his officers though proper...there would soon be an end of all other rights and immunities...To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore more dangerous engine of arbitrary government..."⁷³⁴

⁷³⁴ Yaser Esam Hamdi and Esam Fouad Hamdi, as next friend of Yaser Esam Hamsi, Petitioners v Donald H. Rumsfeld, Secretary of Defense, et al (2004) Supreme Court (No. 03-6696), 28th June 2004.

Whilst the domestic courts have considered deprivation of liberty and assessed its duration and type etc, failure to take into consideration the full impact or risks of measures which such deprivation creates, arguably, demonstrates the extent of judicial deference towards executive decisions. If the impact of such measures, including the impact they have on a suspect's family, was fully taken into account, it is possible that the courts would see measures that were viewed as 'restrictions' on liberty as translating into deprivations of liberty. But this is a matter that has not formed part of the risk assessment undertaken by policy-makers, independent assessors or courts, as this thesis has argued.

Article 6: Procedural fairness and a down-reading

The House of Lords described itself and the courts generally as guardians of the rule of law and "specialists in the protection of liberty".⁷³⁵ As suggested by Ewing and Tham (2008) a weak rule of law has 'implications for the judicial protection of human rights...leading inexorably to low levels of protection of human rights'.⁷³⁶ It is argued that Ewing and Tham's assessment is pertinent in relation to a range of counter terrorism measures enforced post-9/11. The counter terrorism measures discussed in this thesis have seen an increased use of arbitrary decision-making in comparison with ordinary measures in the criminal justice system; this is best illustrated by s44 stop and search, control orders, TPIMs and ETPIMs. It is argued that a heavy burden remains with the state in order to justify detention or restrictions on a person's liberty (Wellman, 2013) without trial. But insofar as indefinite detention is concerned, as seen by the *Belmarsh* case, and most of the counter terrorism measures enforced by the UK, such as control orders/TPIMs and ETPIMs, low standards of proof are imposed. When coupled with the use of closed hearings and limited disclosure, the processes and procedures work in favour of the government and securitization. As this thesis has addressed, once the government has accused the suspect of terrorist-related activity and imposed a counter-terrorism measure on that suspect, the burden of proof in effect shifts from the state to the individual. This approach arises since the suspects have to prove that their behaviour is normal, not abnormal; that they are at risk, rather than creating risks; these are the characteristics of the counter-terror scheme discussed in Chapter One. This analysis can

⁷³⁵ Ewing and Tham (fn 59) 690.

⁷³⁶ Ibid.

be seen to apply in particular to measures such as s44 as discussed in Chapter Two. In relation to the control orders regime, as a suspect is only entitled to minimal disclosure so they may give reasonable instructions to their legal representatives (including special advocates), there is not a level playing field (equality of arms) and suspects have a difficult battle to prove their innocence – which is contrary to Article 6.

If counter terrorism measures are adaptations from the criminal justice system or immigration system, one might expect standards of fair trial or hearing to be upheld. However, UK counter terrorism measures have failed to adhere to those standards, although some standards, such as minimum disclosure, have been developed through legal challenges. This thesis has shown that human rights, particularly Article 6, have been read down since the judiciary has taken a deferential approach to executive stances on security. As exemplified by *Secretary of State for the Home Department v BM*,⁷³⁷ the Court of Appeal interpreted Article 6; this enabled the court to consider whether at the time it was necessary for the measure to be imposed (Walker, 2013); this stance provided minimal rights rather the full ambit of the right a suspect would enjoy under the criminal justice system. Other examples of this come from the issues of disclosure and of knowledge of the full case against the suspect. Prior to the judgment in *AF (No 3)* the executive was against disclosing information to a suspect terrorist; this decision however has led to a re-balance of the provisions, making them fairer in Article 6 terms. The risk is that these ‘exceptional measures’ become normalized because the rhetoric of ‘exceptionalism’ and the logic of pre-emption and prevention shift the accepted standards and practices appertaining to existing and ordinary criminal justice systems (Beck, 2002; 2003; 2006; Ericson and Doyle, 2004; Aradau and van Munster, 2007; Lazarus *et al*, 2013). In other words, the counter terrorism justice system and counter terrorism model which these exceptional measures work under, have established that greater support is given to national security over human rights, even in attempts to re-balance this as seen in relation to TPIMs.

Securitization has supported the executive’s re-configuration of safeguards and protections which would ordinarily be seen in the criminal justice system, in order to fit the new counter terrorism justice system. The discussion of human rights can only take the debate so far,

⁷³⁷ SSHD v BM (fn 644).

whilst consideration and assessment of risk could aid in allowing human rights-based arguments to obtain greater purchase. Whilst it is recognised that discussion surrounding counter terrorism invokes extensive debate of human rights, the tri-relationship which includes risk assessment, aids in the determination that specific Convention rights are breached as a consequence of counter terrorism measures and obligations.

PRE-EMPTIVE AND PREVENTATIVE COUNTER-TERRORISM AND RISK ASSESSMENT

Within the tri-relationship of counter terrorism measures, discussion of risk assessment has enabled the identification of risks which are caused by pre-emptive and preventative measures. Whilst pre-emptive and preventative measures operate slightly differently to one another, the use of such measures plays a pivotal role in the creation of the new counter terrorism justice system and counter terrorism model, given that the UK has moved from a reactive to a proactive approach. The creation of this new justice system and model demonstrates that pre-emption and prevention have become normalized since 9/11 (Fenwick, 2013), and the aims and actions of government have become legitimised in this context (Aradau and van Munster, 2007; Lazarus *et al*, 2013: 466). These measures have been normalized through the government's determination to achieve securitization, which has been identified throughout this thesis; invariably the impact of securitization within the UK counter terrorism measures has resulted in the creation of further risks such as that of radicalisation. This is due to the executive's perception of a state of emergency, a lack of judicial involvement, a lack of accountability and transparency and the use of coercive measures. Ultimately each chapter identified that there are long-term consequences. These arise from the use of pre-emptive and preventative measures, namely they facilitate an increase in support for terrorist organisations and for propaganda campaigns against the UK, and this in turn contributes to the radicalisation of potential terrorists. Due to such potential risks one may question the proportionality and effectiveness of such measures.

The executive's perception of a 'state of emergency'

The existence of a terrorist threat, or terrorist-related activity, is a requirement of UK counter terrorism measures. When examining the s44 stop and search measure it was identified that

an imminent threat test should have been adopted since it would have allowed for a determination as to whether a pre-emptive or preventative measure was being appropriately utilised. As a result it would have become the first assessment undertaken prior to deciding which measure to use. As discussed in Chapter Two, Just War theorists rely on the distinction of the threat to determine whether they need to act and when: ‘pre-emption [is] aimed at grave threats that are imminent, and prevention [is] aimed at threats that, while equally grave or graver, are as yet more distant.’⁷³⁸ Grotius believes that “[w]ar in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed.”⁷³⁹ In the *Belmarsh* case,⁷⁴⁰ Lord Bingham cited the *Greek* case: “[t]he emergency must be actual or imminent, its effect must involve the whole nation, the continuance of the organized life of the community must be threatened, [and] the crisis of danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.”⁷⁴¹

The determination of whether there is a state of emergency or supreme emergency, remains for the government of the day. Walzer (2000) describes these situations as ones where the threat is “literally beyond calculation, immeasurably awful” (2000: 253). This description means that emergency situations must be found to exist, otherwise it would not be possible to justify the importance of repudiating human rights in favour of national security. Wellman (2013) believes that Walzer’s description could be interpreted as a hyperbolic assertion since it views the terrorist threat as so serious or immediate; this means that no calculation would be required to consider whether a balance between human rights and national security is necessary. In Chapter Two, this thesis has argued that it is important that a terrorist threat should be found to be imminent to make it necessary to act pre-emptively; this approach is one which Walzer (1977) would support, identifying the two main criteria to use when determining necessity:

"Though its use is often ideological, the meaning of the phrase is a matter of common sense. It is defined by two criteria which correspond to the two levels on which the concept of necessity works: the first has to do with the imminence of the danger and the second with its

⁷³⁸ Gregory M.Reichberg, Hendrick Syse and Endre Begby (eds) 'The Ethics of War' (Oxford: Oxford University Press, 2006), 403.

⁷³⁹ Grotius (fn 174).

⁷⁴⁰ *A and Others v SSHD* (fn 24).

⁷⁴¹ *Ibid.*

nature. The two criteria must be applied. Neither one by itself is sufficient as an account of extremity or as a defence of the extraordinary measures extremity is thought to require".⁷⁴²

The first criterion confirms the need to act, which would be based on the immediacy test as mentioned. The second criterion takes into account the nature and degree of the threat itself; whilst Wellman (2013) regards this as difficult to interpret, it must be remembered that 'terrorist threats' can invoke imagery of catastrophic consequences (eg bombings). The second criterion supports the assessment and determination of what sort of measure should be enforced and may inadvertently become an assessment of proportionality. If a terrorist suspect supports the ideologies of an organisation, has no intention of participating in violent extremism but is transferring funds to that organisation which the Secretary of State lists as a terrorist organisation, should that person be subject to counter terrorism measures such as a control order/TPIM?

The public perception of terrorism and that of the professional/scholarly communities, or 'opinion-formers' (Gomis, 2013a), is different; the Chatham House-You Gov Survey 2012⁷⁴³ sampled 2,079 members of the public and 735 opinion-formers in June 2012 (pre-London 2012 Olympics). They were asked 'What are the greatest threats to British way of life?' – 50% of the general public identified international terrorism whilst 39% of opinion-formers took this view, as shown Diagram 4:

⁷⁴² Michael Walzer 'Just and Unjust Wars: A Moral Argument with Historical Illustrations' (Basic Books: New York, 1977), 252. Also see Michael Walzer 'Just and Unjust Wars: A Moral Argument with Historical Illustrations' (Basic Books: New York, 2000). Also see Carl Wellman 'Terrorism and Counterterrorism: A Moral Assessment' (SpringerBriefs in Law, 2013) 9.

⁷⁴³ Chatham House 'You Gov Survey: What are the greatest threats to British way of life?' 2012 <<http://chathamhousesurvey.org/default/summary/section-2/question-3>> accessed 12th May 2013.

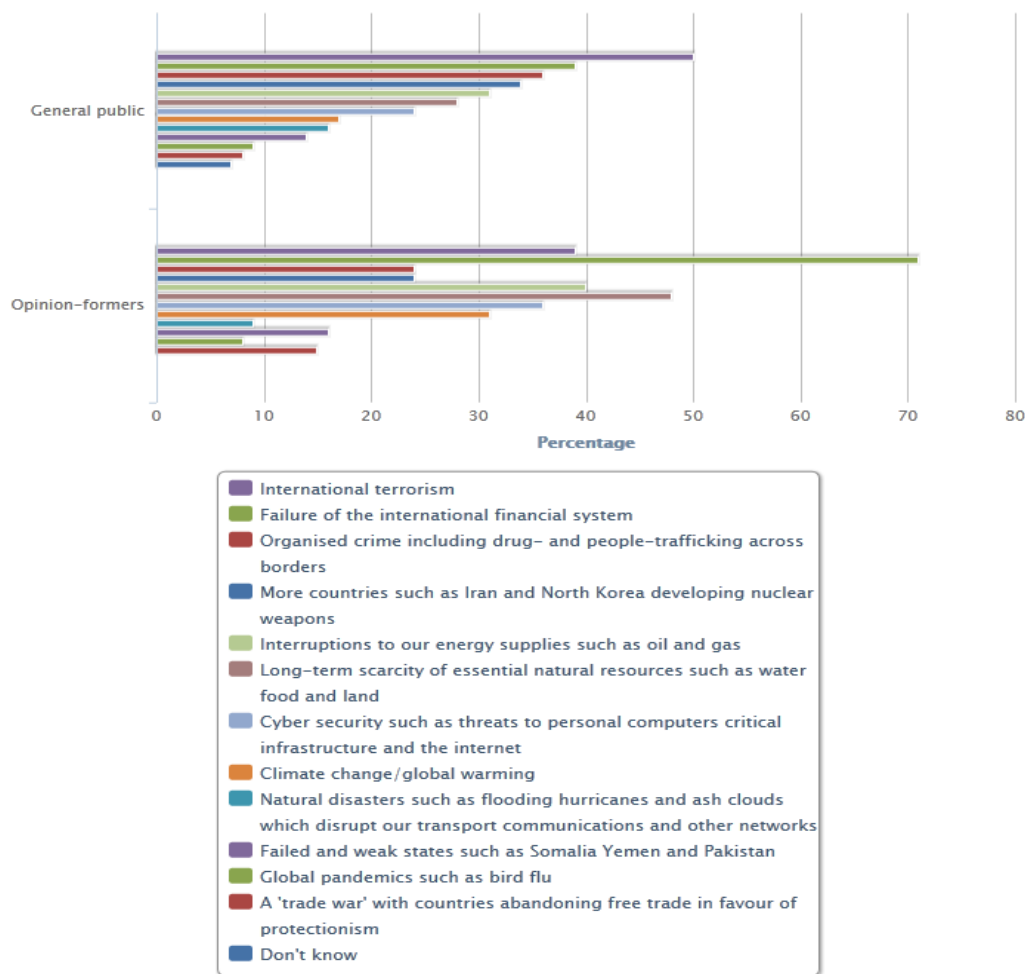


Diagram 4: Chatham House (2012) 'You Gov Survey: What are the greatest threats to British way of life?'⁷⁴⁴

Scholars, such as Gomis (2013a), consider that perceived threats of terrorism are heightened by an anniversary of a previous terrorist attack (eg 9/11 or 7/7), or following a recent terrorist attack or large public events and forums (eg 2012 London Olympics) This may explain why the public perception of terrorism in this survey differs significantly from that of opinion-formers. Due to fear and public anxiety, state officials are more likely to be influenced to take counter-terrorism actions which are not justified by the threat level. Taking such action may be justified by a cost-benefit analysis, as Wellman (2013) explains; the low number of innocent or 'suspect terrorists' detained and removed from ordinary due process is viewed as an acceptable cost compared with the benefit of preventing death and destruction or

⁷⁴⁴ Ibid.

alleviating fear of attacks. However, this 'act-utilitarian justification' would clearly be unacceptable to some, including Walzer (1977):

"The problem is that it is too easy to juggle the figures. Utilitarianism, which was supposed to be the most precise and hard-headed of moral arguments, turns out to be speculative and arbitrary. For we have to assign values where there is no agreed valuation, no recognized hierarchy of value, no market mechanism for determining the positive or negative worth of different acts and outcomes".⁷⁴⁵

Walzer (2004) adds that "[c]ommonly, what we are calculating is our benefit (which we exaggerate) and their cost (which we minimize or disregard entirely)", which may be acceptable to the executive (Walzer, 2004; Wellman, 2013). Where a supreme emergency is anticipated exceptional measures which may be ordinarily considered morally unacceptable due to the effect such measures have on a person, their family and human rights, may be deemed necessary to avert the threat. In order to achieve this there needs to exist an imminent threat so that such measures may be considered necessary. The difficulty seen with each measure examined in this thesis is that judicial scrutiny and involvement is either minimised, lacking or approached in a deferential fashion, allowing the Secretary of State to decide when a state of emergency exists. This reaffirms that this is an executive-led process rather than a legally-led one, supporting the government's aim of securitization.

An indirect consequence of state emergency and the aim of securitization is that questions or doubts are raised about morality. Walzer (1977) believes that the acknowledgement of rights, such as human rights, forces realisation of "our deepest moral commitments" (1977: 262). This thesis argues in support of human rights and the importance of them when considering whether to restrict a person's day-to-day life or freedom without the aid of prosecution and conviction; therefore it takes the stance that the moral commitment to Convention rights should be higher. Walzer (2004) confirms that:

"There are no moments in human history that are not governed by moral rules; the human world is a world of limitation, and moral limits are never suspended – the way we might, for example, suspend habeas corpus in a time of civil war. But there are moments when the rules

⁷⁴⁵ Michael Walzer 'Arguing about War' (Yale University Press: New York, 2004), 38. Also see Wellman (fn 742) 121.

can be and perhaps have to be overridden. They have to be overridden precisely because they have not been suspended"⁷⁴⁶

Wellman (2013) believes that such 'absolutism of rights' is not impenetrable to moral argument; this may come in the format of one person, or minority of people, losing their freedoms or restrictions on their freedoms rather than deprivation of liberty to save the lives and freedoms of many. Wellman's point has been seen in UK counter terrorism measures: Article 3 ECHR is a non-derogable right; yet when deporting a terrorist suspect to another country with poor human rights records', the use of assurances helps to side-step the absolute obligation of Article 3. As a consequence of such practices the UK's moral commitment to the protection of human rights is similarly side-stepped. Consequently, when the UK suspends its commitment to human rights in order to enforce counter-terrorism measures, its moral standing is brought into question. This may be salvaged at times of a state of emergency such as an imminent threat of a terrorist attack. However, given that each of the measures assessed in this thesis were or are not required to be enforced at times of a state emergency, the morality of the UK is still questionable.

Lack of judicial involvement

Counter-terrorism measures discussed in this thesis demonstrate that when the Secretary of State suspends human rights, either in whole or part, when enforcing such measures, there has been limited judicial scrutiny or a deferential attitude by the courts towards the measures. Lord Bingham in the *Belmarsh* case identified that matters relating to terrorism and counter-terrorism remains an executive-based matter, a view considered by Fenwick and Phillipson (2011), when explaining that the assessment of intelligence and the threat posed by suspects is viewed largely as the prerogative of the executive. Despite this there should be judicial involvement to ensure a degree of protection to the human rights of individuals and to remove state oppression. Dershowitz (2006) remarked that there was a need for 'preventative intervention' from the judiciary, particularly when the formal use of the criminal justice system or protections therein are circumscribed, which may reduce the possibility of a future conviction. As Lord Bingham also recognised, this is a fundamental role of the judiciary who

⁷⁴⁶ Ibid.

are guardians to the rule of law and are "specialists in the protection of liberty".⁷⁴⁷ Former Home Secretaries, such as Charles Clarke MP, have supported a reduced judicial involvement in the process of enforcing counter-terrorism measures, on the basis that 'the Government's and my, prime responsibility is to protect the nation's security. In many ways, that is our paramount task. Decisions in this area are properly for the Executive, who are fully accountable to Parliament for their actions.'⁷⁴⁸ Walker (2013) would describe this as 'political constitutionalism' which purports to achieve constitutionalism, such as accountability and democratic representation, by political instead of legal mechanisms. Walker (2013) suggests that this is achieved through interaction between government and Parliament, although as will be argued this has been reduced through measures such as TPIMs and ETPIMs.

There has been the suggestion by Zedner (2007b) that judicial interference results in further restrictions being imposed. As explained in Chapter Three, the *Belmarsh* case led to the implementation of control orders which illustrates this point. The control order regime and TPIM/ETPIM schemes demonstrate the restrictive involvement given to the judiciary in counter-terrorism measures in which the court needs to determine whether the decision of the Secretary of State was obviously flawed. Whilst some academics, such as Ewing and Tham (2008), would consider the lack of or reduced judicial involvement to be a result of legislation, and therefore an example of the 'laws against laws' theory; as mentioned in Chapter Three, the judiciary have a mandate to provide declarations of incompatibility. These have not been used against counter-terrorism measures since the *Belmarsh* case. This in itself raises questions of the judiciary's morality and moral commitment to human rights.

Whilst there has been reduced involvement by the judiciary, counter-terrorism measures have seen an increase in the use of quasi-judicial roles which are ordinarily given to the Secretary of State. The exception to this is s44 stop and search which gave a quasi-judicial role to police. This exceptional measure was understood to reduce the trust given to the police due to the perceptions such powers (like s44) gave: "[m]y confidence in the police is at an all-time

⁷⁴⁷ Ewing and Tham (fn 59).

⁷⁴⁸ House of Commons (fn 233).

low, I don't trust them and because of the powers they now have I trust them less".⁷⁴⁹ One would argue that the same feeling of mistrust would be felt towards the UK government. Human rights organisations have condemned suggestions to create specialist courts "as an attempt at co-opting judges into administrative detention policy" (Zedner, 2005: 528); doing so would only further raise questions of the judiciary's moral standing, judicial findings and independence.

As explained in Chapter Three, the TPIM and ETPIM schemes there is a legislative reviewing process which involves the Secretary of State, security services, police and Crown Prosecution Service, known as TRG in accordance with s10(5) TPIMA 2011. The primary function of the TRG is to determine whether it is possible to prosecute a suspect, although one may be cynical about whether prosecutions are likely whilst a suspect is subject to a TPIM/ETPIM, given that no successful convictions are recorded under the former control order regime. One aspect of scrutiny, one may argue, comes from open debate and Parliamentary scrutiny. Parliamentary scrutiny itself became seen as 'a bit of fiction',⁷⁵⁰ despite recognition that such a safeguard could identify and recognise faults in such executive powers (Walker, 2013). Under the TPIMA 2011 s19, quarterly reports are 'quantitative in nature', but provide no opportunity for debate, as recognised by James Brokenshire MP.⁷⁵¹ Some may view the independent reports by the Independent Reviewer of Terrorism Legislation as a form of independent scrutiny; however under s20 TPIMA 2011 the provision for reviews by the Independent Reviewer provide no time limits or deadlines for a report to be produced. Given that UK counter terrorism measures post-9/11 have increased the reliance on executive judgments and decreased the scrutiny of those judgments, one would expect the judiciary to ensure that there is accountability and transparency, given that such judgments can result in the loss of liberty and have very restrictive effects on people's private lives. As Walker (2013) explains, there should be an increase in the 'judicialisation of intelligence' in

⁷⁴⁹ Human Rights Watch 'United Kingdom Without Suspicion: Stop and Search under the Terrorism Act 2000' 2010 (July), 57 <<http://www.hrw.org/sites/default/files/reports/uk0710webwcover.pdf>> accessed 1st September 2013. Also see: Basia Spalek 'Counter-terrorism policing and section 44 profiling' in 'Ethnic Profiling: The Use of 'Race' in UK Law Enforcement' (The Runnymede Trust, February 2010).

⁷⁵⁰ Public Bill Committee, House of Commons 'Terrorism Prevention and Investigation Measures Bill' 2010-2012a First Sitting (21st June 2011) PBC Bill 193, 23.

⁷⁵¹ Public Bill Committee, House of Commons 'Terrorism Prevention and Investigation Measures Bill' 2010-2012b Eighth Sitting (30th June 2011) PBC Bill 193, 251.

assessing the scope, standards and processes for testing intelligence, rather than simply accepting the conclusions of the Secretary of State.

Lack of accountability and transparency

Clearly, for the reasons set out, judicial involvement is crucial to ensure accountability and transparency of executive decisions and actions. Briggs (2010) believes that accountability mechanisms can recognise that whilst the executive has responsibility for decisions, actions and processes, responsibility of the decision-making processes can be shared with others. In this regard frontline police officers who enforce exceptional powers like s44 stop and search, would be accountable for their decision to stop and search individuals which would prevent racial-profiling; there would also be accountability shared with senior police officers and the Secretary of State who would be party to the process of allowing the use of such counter-terrorism measures. This would also prevent arbitrary decision-making. For the DWA measure, there needs to be accountability in respect of both the contracting and receiving state. Given that assurances under this measure are considered to be bi-lateral agreements or 'paper promises from torturers'⁷⁵² and are unenforceable in the courts if breached, there needs to be accountability by the UK as a safeguard to provide a remedy for any breach. The difficulty with this suggestion is that it would be difficult to monitor compliance with the assurances, as discussed in Chapter Four. The control order regime and TPIM/ETPIM schemes, provide accountability of executive decisions from either judicial or Parliamentary scrutiny, or both. As mentioned earlier, judicial scrutiny has been limited by legislation and the judiciary have been deferential towards executive judgments; Parliamentary scrutiny has been limited.

By providing a lack of accountability, a lack of transparency arises and the risk remains that the UK's moral reputation is damaged. As Briggs (2010) clarifies, a strong reputation is based upon the perceptions of others, such as communities, and their perceptions can only be based on what they see or are involved with. Therefore, if the decision-making process is not accountable, it becomes difficult to ensure that disproportionate decisions are not made. For example, the *CA* case demonstrates that whilst the Secretary of State deemed it necessary to

⁷⁵² Roach (fn 364) 288.

impose a relocation obligation upon the suspect who was subject to a control order, the judge held that with the assistance of CA's wife he was less likely to be involved with terrorist related activity. In this case, had the judge not held the Secretary of State accountable for her decision and considered the potential long-term effects of such measures/obligations (eg social isolation), then CA may have remained a terrorist threat and his family would have resented the UK government for the breakdown of the marriage.

UK pre-emptive and preventative measures are coercive

An aspect of accountability comes from the determination of whether there has been a deprivation of liberty; this may occur in various forms including coercion. It falls upon the judiciary to avoid deference towards executive submissions and ensure that a deprivation of liberty does not result, as well as protecting human rights. The obligations imposed under a control order/TPIM or TPIM identifies a coercive nature, similar to that seen in s44 stop and search, as mentioned in Chapter Five.

Coercion in s44, control orders, TPIMs and ETPIMs is demonstrated through the strict criminal liability they impose, enforcing compliance by citizens in respect of the execution of these counter terrorism measures. As explained in Chapters Two and Three, suspects were forced to comply with s44 and the obligations under the control order regime, this was coercive because failure to adhere resulted in criminal action. Coercion which mimics legally justified punitive practices has increasingly been used by the UK government to pre-empt terrorism; this is considered justifiable in the name of 'exceptionalism' (Lazarus *et al*, 2013)⁷⁵³ and may also form part of the state of emergency argument. Scholars such as Lazarus *et al* (2013) acknowledged that coercive measures do not constitute punishment. This thesis recognises that coercion on its own would not cause a breach of Convention rights; however, when cumulatively added to other factors, including the impact of a measure on a suspects' social contacts, a breach may occur of Article 5. Thus the risks caused by the counter-terrorism measure are disproportionate to their value (eg since negative perceptions of the state arise).

⁷⁵³ Liara Lazarus, Benjamin Goold and Caitlin Goss 'Control without Punishment: Understanding Coercion' 2013 The Sage Handbook of Punishment and Society.

Given that coercion causes a person to change their behaviour, by imposing a sense of ‘self-policing’ on a suspect (Zedner, 2007a; 2007b; 2008), greater control and management over a suspect’s life is the output or consequence. It also assists the government in achieving securitization, although the long-term risk of coercion has meant the development of ‘inadvertent legitimising of [the use] of coercive measures’ (Lazarus *et al*, 2013: 464). UK counter-terrorism measures post-9/11 have seen the introduction of a range of ‘exceptional’ coercive measures; these include s44 stop and search, control orders, TPIMs and ETPIMs.

When enforcement of counter-terrorism measures are based on fragmented or unclear information, some of which may be gained by torture, the ability of police to undertake effective investigation of suspects may be effected. Whilst preventative policing, like s44, may deter terrorism, this thesis has shown it does not support government policy in prosecuting and convicting terrorists. As a result, the use of these measures can be questioned because they should not be used to simply snoop on the public in the hope of identifying terrorists. It is suggested by Gross (2003), Ackerman (2004), Ignatieff (2004) and Lazarus *et al* (2013) that measures such as those discussed in this thesis, are justified when limited to emergency circumstances; it therefore follows that without emergency reasons such measures are unjustifiable. It is important therefore, that there exists an emergency situation, which can only be determined if there is an imminent threat of terrorism that will be realised (as discussed earlier), and the measures enforced are proportionate to counter-act the threat. The problem established in this thesis is that these measures fail to identify emergency circumstances; therefore they are enforced at the Secretary of State’s discretion and can create a blanket-ban or rolling-programme of control, as seen in relation to s44, control orders and TPIMs/ETPIMs. This situation, having been created by securitization, becomes normalized and enables the use of a counter-terrorism justice system or counter-terrorism model: this thesis opposes the counter-terrorism justice system or model becoming the norm; rather it should be the exception.

Normalization of securitization and the potential long-term consequences

Post-9/11 there has been an increased normalization of precaution, risk management and preventative action (Beck, 2002; 2003; 2006; Ericson and Doyle, 2004; Aradau and van Munster, 2007; Lazarus *et al*, 2013; Fenwick, 2013). As mentioned earlier, all of the counter-terrorism measures adopted by the UK are adaptations of pre-existing criminal justice measures: s44 is an adaptation of ordinary stop and search police powers; control orders, TPIMs and ETPIMs are adaptations of other preventative orders, whilst DWA is an adaptation of immigration laws and the immigration system (Roach, 2011). Given that counter-terrorism measures can have an appearance or *prima facie* appearance of being part of the criminal justice system or ordinary immigration process, it becomes crucial that one is capable of distinguishing the two types of process so that counter-terrorism measures do not become normalized and accepted as an available everyday measure.

If counter terrorism measures become normalized the UK's moral commitments and reputation would be under constant adverse scrutiny; such a situation would also create a fundamental shift from counter-terrorism measures as exceptional to a situation in which they are typical. For the DWA and immigration system the distinction between the two would rest on 'rights of citizens as opposed to non-citizens' (Bosworth and Guild, 2008; Lazarus *et al*, 2013). In 2014 the CPS had applied to hold a terrorist trial against 'AB' and 'CD' in secret, preventing the evidence in the case from being disclosed or reported in wide-media. Applications of this kind is supportive evidence of the 'Counter-Terrorism Model' and a new counter-terrorism justice system becoming normalized. A risk associated with counter-terrorism measures becoming normalized is that future terrorist attacks may result in the belief that further exceptional measures will need to be enacted (Donohue, 2000: 40; Finn, 2010). The normalization of extraordinary powers increases the risk of repression of sectors of the community becoming acceptable; with ever increasing repressive measures being called on to manage potential threats (Finn, 2010).

Normalization consequently muddies the distinction between normalcy and emergency which in turn undermines the concepts in question and affects the debate surrounding proportionality, human rights and constitutional norms. A long-term risk of counter-terrorism

measures becoming normalized is radicalisation and stigmatization, or development of suspect communities, caused by those measures. Whilst control orders, TPIMs and ETPIMs are not enforced by racial profiling, s44 stop and search was, and this strengthened negative perceptions and resentment towards the police and emanations of the state. Throughout this thesis there has been concern that UK counter-terrorism measures may contribute towards the radicalisation of terrorists; this may include the children of those subjected to control orders/TPIMs and ETPIMs, having indirectly suffered as a consequence of those measures. As Briggs and Birdwell (2009) confirm, it is rarely possible to prove more than the exception, rather than the rule, it being 'almost impossible to say with any certainty what the causes are as it is so difficult to know whether a factor is instrumental, or merely present.'⁷⁵⁴ Although it is not possible to provide evidence showing a link between those subject to counter-terrorism measures, either directly or indirectly, and radicalisation, it remains a possible risk and working on a precautionary basis it would be inappropriate to ignore it. Briggs (2010) explains that whilst the executive want to gain the confidence of Muslim communities, or those that would most likely face being subject to counter-terrorism measures, it must retain 'the moral high ground and show it is committed to tackling the injustices faced by Muslims...';⁷⁵⁵ this would include trying to cancel out possible causes or contributing factors which influence radicalisation; this would include racial profiling and stigmatization.

It is argued by Briggs (2010) and Gomis (2013a) that there are some, such as the Communities and Local Government Select Committee,⁷⁵⁶ who believe that UK preventative measures should tackle threats related to and inspired by Al-Qaeda, rather than encapsulating other forms of violent extremism which may be present in far right groups. Briggs (2010) explains that the West Yorkshire police conducted a number of raids and discovered far-right group members in possession of 80 bombs. A member of these groups, Neil Lawington, was arrested in 2008 on the cusp of waging a terror campaign when a large amount of chemical explosives were discovered with the British National Party election candidate Robert Cottage. Similarly, Martyn Gilleard was found to be in possession of a huge stash of nail bombs and a letter in which he declared: "I am so sick of hearing nationalists talk of killing Muslims, of

⁷⁵⁴ Rachel Briggs and Jonathan Birdwell 'Radicalisation among Muslims in the UK' 2009 MICROCON Policy Working Paper 7 (May) <http://www.microconflict.eu/publications/PWP7_RB_JB.pdf> accessed 7th July 2013.

⁷⁵⁵ Rachel Briggs 'Community engagement for counterterrorism: lessons from the United Kingdom' 2010 International Affairs 86(4): 971-981, 973.

⁷⁵⁶ Ibid.

blowing up mosques, of fighting back, only to see these acts of resistance fail to appear. The time has come to stop the talk and start to act".⁷⁵⁷ Rather than treat these incidents separately, one would argue that terrorism should be equally attributed to those violent extremists that fall within the meaning of s1 TA 2000, rather than deal with one type of terrorist threat differently to another. The stigma may otherwise be attached to one type of terrorism over another; indeed Briggs (2010) raises concerns of stigma being attached to 'suspect communities' such as Muslim groups. Silvestri (2010) and Briggs and Birdwell (2009) believe that Islam is not inherently violent but despite this, links are created between those that believe in Islam with those that practice violent extremism.

A stigma is believed to have been attached to the Muslim community. A survey conducted by FAIR (2004), cited by Bunglawala et al (2004), showed that since 9/11, 80% of those Muslims that responded to the survey had been subjected to Islamophobia; 68% felt that they had been perceived and treated differently; 32% reported being subjected to discrimination at UK airports (Briggs and Birdwell, 2009). Some suggest that young Muslim men suffer disproportionately and have emerged as the new 'folk devils' of popular and media imagination (Alexander, 2000; Bunglawala et al, 2004). Briggs and Birdwell (2009) described how Muslim men have been conceptualised as 'dangerous individuals' with a capacity for violence and/or terrorism, but they are also seen as 'culturally dangerous', suggesting that they are threatening 'the British way of life' (Bunglawala et al, 2004; Briggs and Birdwell, 2009). Despite this there are no specific links between race, religion or nationality etc which can be used to detect terrorists, as explained in Chapter One.

The assessment of human rights and the input risk assessment can have in assessing counter-terrorism measures, provides a holistic review of whether a specific measure or obligation is proportionate or disproportionate and effective or ineffective. This tri-relationship not only takes into consideration Convention rights and whether they are breached, it identifies the possible short-term and long-term implications of such measures, including negative perceptions of the police and state, lack of accountability, radicalisation and risks of securitization.

⁷⁵⁷ Ibid.

TRI-RELATIONSHIP: COUNTER-TERRORISM, HUMAN RIGHTS AND RISK

It is important that counter terrorism measures do not breach the rule of law, as this is considered to be the very goal which terrorists aim to attack, creating 'the destabilisation of society through the spreading of fear and alarm'.⁷⁵⁸ It is vital that the rule of law does not become collateral damage caused by the measures invoked to remove or reduce the terrorist threat (Dickson, 2005). Walker (2013) recognises that when terrorist suspects are dealt with outside the criminal justice system and criminal law, there is a cost to the fundamental rights of the suspect. The era of securitization post-9/11 which has developed, has caused a fusion of 'criminal justice and national security' strategies (McCulloch and Pickering, 2009). This thesis concurs with this view, taking into consideration the CONTEST strategy and counterterrorism measures such as s44 and control orders/TPIMs and ETPIMs. The tri-relationship model which this thesis has identified as a way of assessing UK pre-emptive and preventative measures has been used to address the main questions which this thesis has ventured to examine; (i) Are counter-terrorism measures proportionate to the threat; (ii) Are they an effective way of countering terrorism; and (iii) do they support the UK Strategy 2011?

Are the measures proportionate?

Throughout this thesis it has been shown that some counter terrorism measures have been found to cause a breach of human rights, or create risks which stretch beyond that which the measure intended. Since the *Belmarsh* case those measures have increasingly been enforced or adapted to be proportionate and avoid breaching Convention rights. The assessment of proportionality is of fundamental importance when using measures such as DWA and TPIMs or ETPIMs. In terms of DWA, the importance of assessing whether the assurances provided are proportionate to the 'real risk' that the suspect will be tortured upon their return to the receiving state is recognised. Similarly, do imposed obligations proportionately restrict the threat from being realised? The determination as to proportionality can be ascertained by various calculations and formats; in this thesis the assessment considers human rights and whether any exceptions are available, followed by taking into consideration any risks which

⁷⁵⁸ Brice Dickson 'Law versus terrorism: can law win?' 2005 European Human Rights Law Review 1: 11-28.

have been discussed throughout this thesis (eg social isolation, indirect negative impact upon the suspect's family etc). Some measures, such as control orders, have been considered justifiable because they 'constitute a less burdensome form of preventative detention' when compared to Part 4 ACTSA before it was struck down by the House of Lords (Lazarus *et al*, 2013); although in comparison, TPIMs and ETPIMs are believed to proportionately impact upon an individual's freedom (Walker, 2013). This can be seen in the *CF* case⁷⁵⁹ when the obligations imposed were varied slightly so that CF (a student) could live a normal student life. Ultimately, the TPIM scheme is considered by Walker (2013) as a more 'proportionate response to terrorism risk than the models of control orders that formerly operated'.⁷⁶⁰

Alternatively, proportionality can be determined by quantum and cost effectiveness. Professor Mueller at the Chatham House 2013 seminar on 'Counterterrorism: The Right Response?'⁷⁶¹ suggested that the first question to consider in assessing counterterrorism mechanisms is 'how safe are we?'. In answering this question, Mueller explained that the UK citizen (including citizens in Northern Ireland) has a 1 in a million per year chance of being killed as a consequence of terrorism. With these low chances, Mueller questioned whether the minimal chance of terrorism should be enough to justify the counter-terror measures in place. On a political basis this would be unlikely to be a positive or acceptable policy. It is also important to note that as the UK has adopted a pro-active approach, rather than a reactive approach, in its CONTEST strategy, minimal action is unlikely to be favoured politically. For risk thinkers the assessment being proposed by Mueller may be acceptable when compared to other day-to-day issues, for example road traffic accidents, cancer or murder; if the chance of being affected by one of these is greater, then increased resources should be reduced from tackling terrorism and increased to deal with that other issue. This concept was discussed extensively by Amoores and de Geode (2008).

⁷⁵⁹ *CF v SSHD* (fn 714).

⁷⁶⁰ Walker (fn 256).

⁷⁶¹ Chatham House, 'Counterterrorism: The Right Response?' (6th September 2013), Professor John Mueller, Woody Hayes Chair of National Security, Mereson Center for International Security Studies, The Ohio State University and Professor Sir David Omand GCB, Visiting Professor at King's College London; Security and Intelligence Coordinator, Cabinet Office UK (2002-2005) <<http://www.chathamhouse.org/events/view/193133>> live stream viewed on 6th September 2013.

When considering the matter of proportionality on a human rights basis, as mentioned in Chapter Five, Articles 8 – 11 ECHR provide grounds on which the state may rely on one of the exceptions to the Convention right in question, so long as the proportionality principle is adhered to. Determining whether the response to the threat posed by the suspect terrorist is proportionate to that threat depends upon the ECHR Article which may be invoked, meaning that a blanket proportionality test cannot be applied. The down-grading recalibration of Convention rights or of interpretations of proportionality has been seen in each of the chapters discussed in this thesis. Article 3 is an absolute right, as discussed in Chapter Four, despite this the UK government attempted to try and do so and create a ‘Suresh exception’ or similar test (see Chapter Four). Whilst Article 3 is a non-derogable right, DWA represents a counter terrorism practice that has been developed and identified as an acceptable way to alleviate executive responsibility for upholding the right. This has not softened the human rights concerns when one considers the risk assessment arm of the tri-relationship, the need for securitization and restrictions imposed under counter terrorism measures in favour of executive-led control.

The thesis has examined the risks of counter-terrorism measures and the identified issue of morality: should morality or does it form part of the process to determine whether a measure is proportionate? Wellman (2013) argues that morality is indeed a fundamental part of such processes. As identified earlier, the question of morality is raised when human rights are overridden. Wellman explains that a response by the state can be justified not when balancing national security with moral rights or human rights, but in the assessment of each measure and its response to the prevention of harm and the protection of rights which are then weighed against the moral limits. As discussed earlier in this chapter, justification to act immorally may depend upon the imminence of the threat which has been described as a ‘supreme emergency’. Walzer (2004) and Wellman understand that this creates imagery of the disaster, which then devalues morality and facilitates an opportunity to take necessary action "so long as what we do doesn't produce even worse disaster" (Walzer, 2004: 40; Wellman, 2013: 122); this would be viewed as proportionate. As Wellman (2013) best describes it:

'[the] principle of proportionality is presupposed when a moral obligation is overridden by a conflicting moral obligation; the latter must be relatively strong and the former relatively weak given the circumstances.'⁷⁶²

This assessment by Wellman takes into account the necessity or imminence of the threat to determine whether any action is proportionate. Wellman is right in identifying this as an appropriate safeguard, although it then falls upon appropriate scrutiny to determine whether a threat requires a necessary response and this is not easily achieved. One would argue that just because the law allows for the derogation of human rights or for human rights to be overridden, the moral duty or obligation to respect basic fundamental human rights should not be suspended. Given that actions such as these are viewed as being the terrorist's true target, the state should not be so easily swayed. Instead, when dealing with matters of terrorism one would argue that the need to respect and protect human rights and therefore the moral obligations that follow is increased.

For counterterrorism measures such as control orders, TPIMs and ETPIMs, the assessment of proportionality has been determined by the legislative framework (eg PTA 2005 and TPIMA 2011). The Secretary of State has the power to determine whether an imposed obligation is necessary and proportionate to alleviate the risk posed by the suspect. It becomes unlikely that the courts would rule against the Secretary of State's decisions, particularly more so with TPIMs which are less restrictive than the former control order regime. This, one would suggest, operates in a similar way with assurances under DWA. S44 required European intervention before it was held to create a breach of human rights (Article 8) and given the risk of arbitrary decision-making by the police and possible racial profiling, this measure was viewed as disproportionate. If one excluded the discussions of risk of the other measures then one may conclude that DWA, control orders/TPIMs and ETPIMs are proportionate, given that there is a process of proportionate consideration involved, as discussed earlier. Although when adding in the identified risks, one may conclude that these measures are disproportionate, conversely Wellman (2013) determined these measures may still be deemed proportionate, if used at a time when the suspect posed an imminent threat to national security. If these measures are not used at such times, then they are disproportionate because the threat is not at such a stage as to require intervention or state oppression. This

⁷⁶² Wellman (fn 742) 124.

demonstrates that the courts need to proactively be a part of the process in determining whether a threat is imminent and that the response is justified.

Are the measures effective?

This thesis does not consider that the assessment of proportionality is simple or straightforward. When determining whether a counter terrorism measure is proportionate to the threat it is meant to meet, the assessment of effectiveness will be relevant: if the measure is ineffective then it is most likely to be disproportionate; if it is effective, it is possible that it is proportionate. As Lum et al (2006) and van Um and Psoiu (2011) confirm, due to the proliferation of counter terrorism measures post-9/11 there has been an increase in output "[y]et, we currently know almost nothing about the effectiveness of any of these programs" (Lum et al, 2006: 510; van Um Psoiu, 2011: 2). Some may argue that counterterrorism measures can be justified if they increase the security and safety of the state and its citizens, although this thesis believes that the counterterrorism measures used by the UK excessively curtail the liberty and human rights of citizens, which results in the risks this thesis has identified throughout. Ultimately, it is the violation or diminution of human rights which can limit the support for and legitimisation of counter terrorism measures (Wellman, 2013).

The assessment of effectiveness is widely accepted as difficult to achieve with counter terrorism measures (Edwards and Gomis, 2011). Similar to the assessment of proportionality, a stumbling block for determining effectiveness is the secrecy of systems involved in enforcing counterterrorism measures (Walker, 2013). Young (2001) developed a simple process of calculating counterterrorism effectiveness, this was reused and applied by van Um and Psoiu (2011). It is a three stage process: (i) output; (ii) outcome; and (iii) impact. The output effectiveness refers to the measure, regulation, policy or legislation which is being implemented; the outcome effectiveness considers the direct and measureable effect which the measure is intended to have in real-terms. In other words, this looks at the aims of the measure itself. The impact effectiveness considers the consequences of the measure itself. This sort of process may be used to determine proportionality. It has been applied to each measure this thesis has examined and is illustrated in Diagrams 4 – 7 (below).

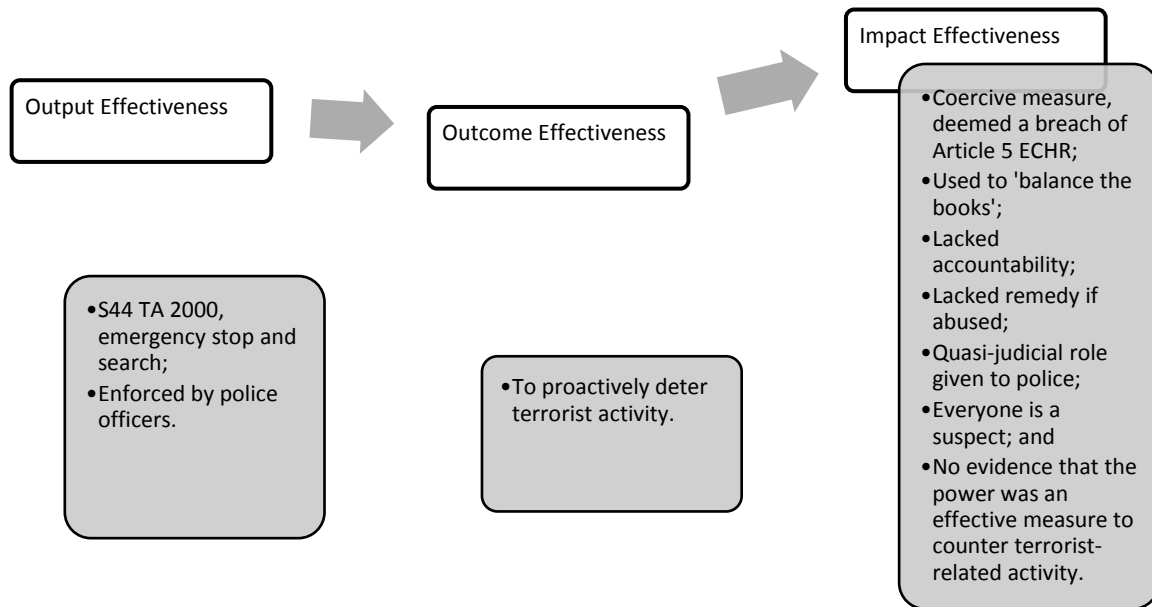


Diagram 4: S44 stop and search

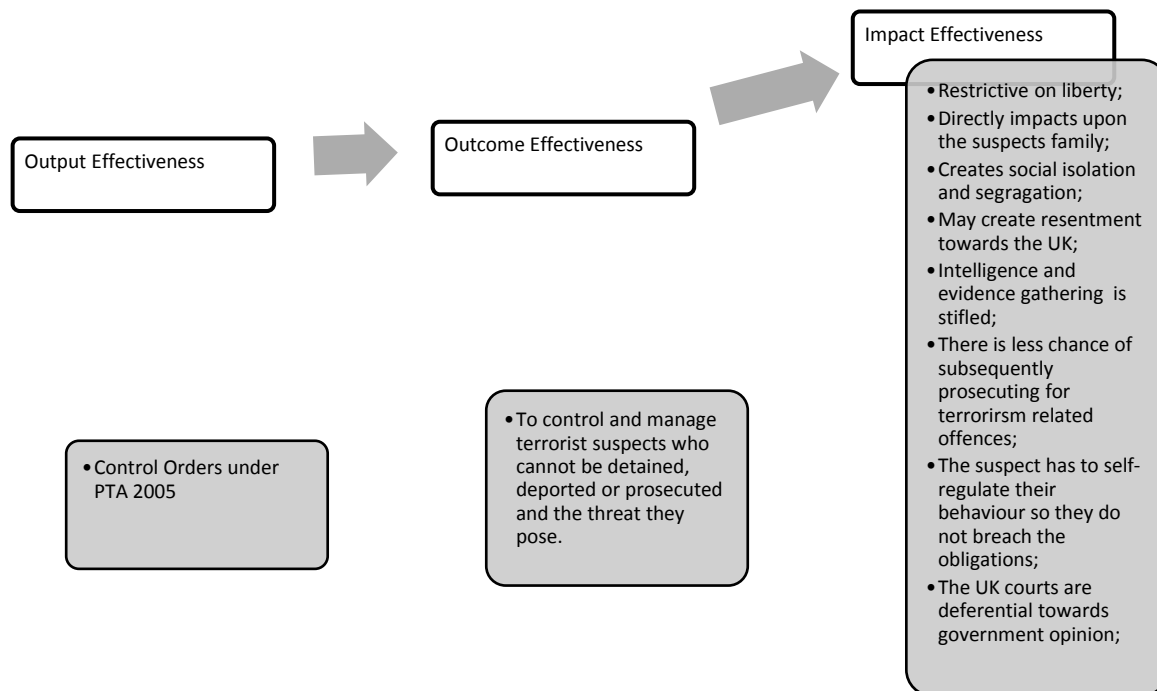


Diagram 5: Control orders

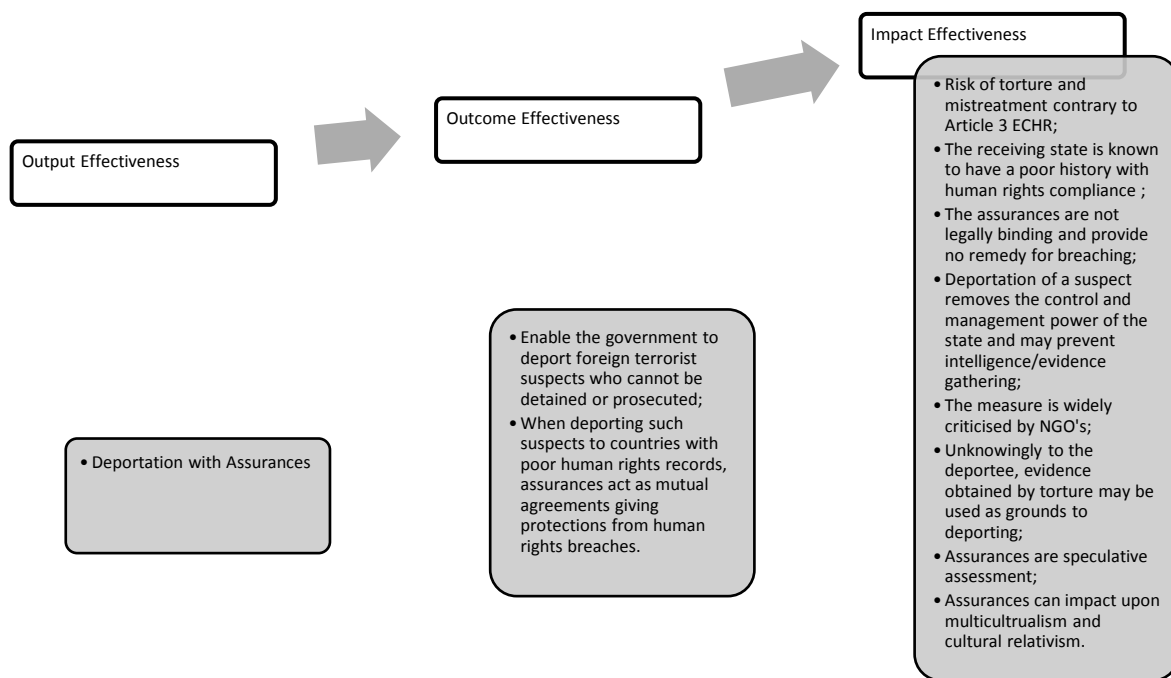


Diagram 6: Deportation with Assurances ('DWA')

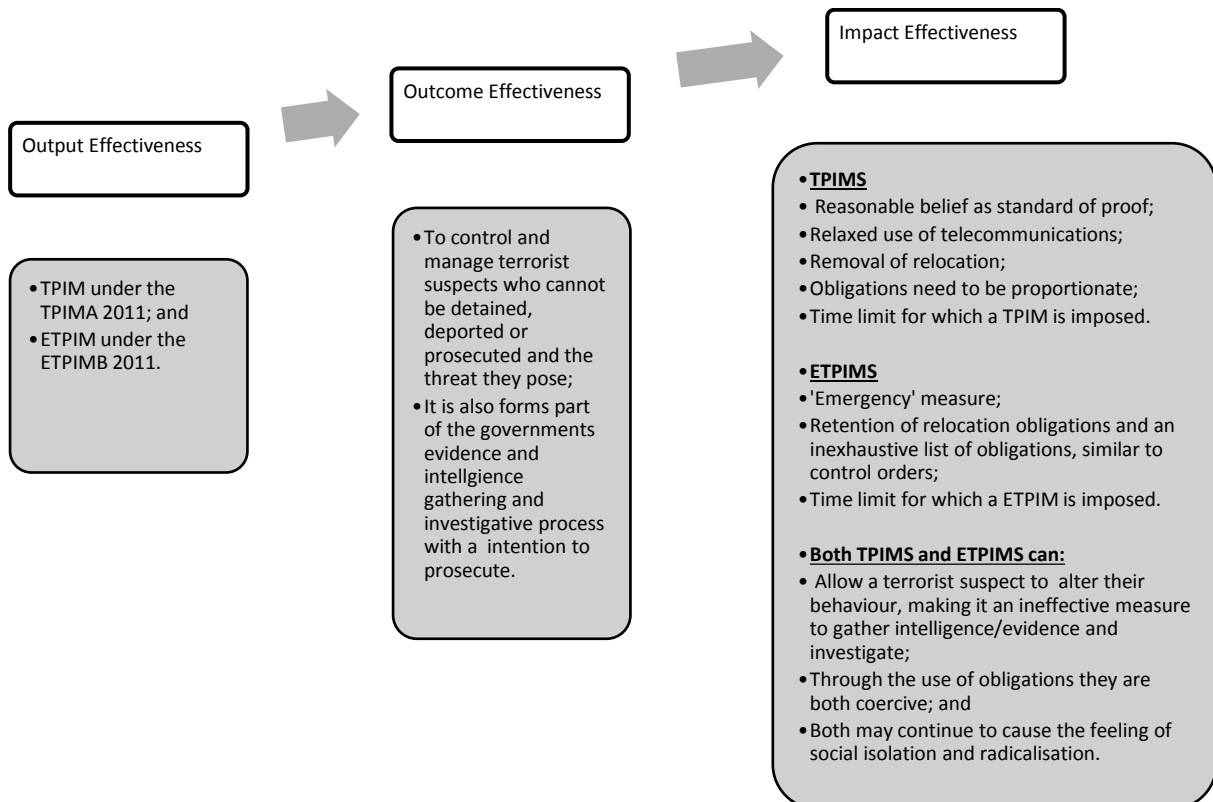


Diagram 7: TPIMs and ETPIMs

These illustrative processes of effectiveness for each counter terrorism measure shown in Diagrams 4 – 7 (above), provide a clear mapping process which identifies not just the aim of each measure, but the actual impact of those measures. Scholars and academics have considered effectiveness of measures by considering their intended and un-intended side-effects (Tudge, 2004; Ganor, 2005; Keohane, 2005; Lum et al, 2006; Stohl, 2006, Spencer, 2006; van Dongen, 2009; van Um and Pisoïu, 2011).⁷⁶³ UK preventative measures, such as control orders and TPIMs/ETPIMs, have developed since the repeal of the Part IV measure. The control order regime provided the executive with exceptional powers to control and manage a person's day-to-day life in the absence of a criminal conviction, which the domestic courts have deemed a restriction as opposed to a deprivation of liberty. However, an alternative view may result once the risks are evaluated. TPIMs and ETPIMs developed from the former control order regime and perform a similar role: ETPIMs are almost an exact replica of the former control order regime, whilst TPIMs are intended to improve on investigative and evidence-gathering process to assist in securing criminal convictions, which the MacDonald Report (2011) recommended should happen. Anderson QC has acknowledged that TPIMs and ETPIMs cannot achieve both aims; this is supported by the discussion of detecting terrorist networks in Chapter Five. A suspect who knows that they are being monitored is less likely behave openly or continue to engage with terrorist-related activity more freely (Fenwick, 2012b; 2013), meaning the government and security services are less likely to be able to identify the 'known unknowns' as described by former US Secretary of Defense, Donald Rumsfeld (2002) and Briggs and Birdwell (2009). Measures such as TPIMs and ETPIMs work as a similar deterrent to the s44 measure – they deter the suspect from engaging in terrorist-related activity and prevent investigative and evidence-gathering processes.

S44 was enforced as preventative policing to deter terrorists from engaging in their terrorist-related activity by providing broad stop and search emergency powers; although did little to support the police in investigating and gathering intelligence to prosecute and convict terrorists. Government Ministers participated in ethnic profiling for s44, despite this measure

⁷⁶³ Eric van Um and Daniella Pisoïu 'Effective counterterrorism: What have we learned so far?' 2011 (September) Economics of Security Working Paper 55 EUSECON <<http://www.economics-of-security.eu>> accessed on 23rd September 2015.

being used against those that did not fit the stereotypical profile of a terrorist; therefore became open to abuse and arbitrary decision making. The measure itself provided no remedial approach when police acted or behaved disproportionately and in light of the fact that the measure created further negative perceptions of the police and distrust of them, concerns are raised as to whether such a measure could be effective. This failure to provide remedial measures and checks led to human rights breaches or caused risks to come to fruition, and is a serious flaw within the safeguarding of the counter-terrorism measures considered within this thesis. For example, this is a missing safeguard in the DWA process – a suspect deported who is later mistreated by the receiving state means that the agreed assurances are breached, as discussed in Chapter Four. Similarly, both DWA and s44 fail to support the government and security services in their detection of terrorist networks (see Chapter Five) and identification of the ‘known unknowns’.

Unlike s44 or the preventive measures of control orders and TPIMs/ETPIMs, DWA redresses the dilemma identified by the *Belmarsh* case: what does the government do with foreign terrorist suspects? The use of assurances have been identified as an acceptable practice, which side-steps the responsibilities of Article 3 ECHR. As well as the risks in the use of assurances, as discussed in Chapter Four, DWA raises risks to the UK’s moral reputation for protecting human rights. Whilst some of the suspects themselves may be deeply disliked and dangerous suspects, such as Abu Qatada, the UK still knowingly deports a person to a state where historical practices show torture is readily used or accepted; similarly standards and protections under Article 6 are questioned. This thesis does not question the use of deportation as a measure to counter terrorism; however if the UK seeks to control and manage a threat whilst simultaneously protecting its reputation and beliefs, then the need for assurances cannot be considered an effective counter-terrorism measure.

From the assessment of each counter-terrorism measure and the risks that arise, dependent upon the intended outcome of a measure, pre-emptive and preventative measures are seen as being generally ineffective. Measures such as those examined in this thesis, cannot play the dual role of controlling a suspect and supporting evidence/intelligence gathering processes. Measures are enforced when it is not possible to convict a suspect for a terrorist-related activity, they are early interventionist measures, empowering an executive-led process which

has become the norm within the counter-terrorism justice system and counter terrorism model. Given that the suspects, who are subjected to the pre-emptive and preventative measure are not convicted of any terrorist-related activity, it becomes even more important that such models are restricted and the criminal justice system model and human rights approach are engaged with.

Do the measures support the UK Strategy?

The assessment from each chapter of each measure has identified concerns that exist in pre-emptive and preventative counterterrorist measures, and it is argued that they contradict the UK Strategy 2011. The 2011 strategy, or CONTEST, has re-evaluated the UK government's perception on how to deal with terrorism. The strategy clearly adopts the importance of improving the UK's ability to prosecute and deport terrorists and increase capabilities to 'detect, investigate and disrupt terrorist threats'.⁷⁶⁴ The risk of each measure examined in this thesis demonstrates that pre-emptive and preventative action can stifle these two important aims of the strategy. Firstly, the former s44 measure identifies that having a 'police presence...terrorists are unlikely to carry out acts of terrorism' (Home Office, 2009-2010; 2010-2011). This works on the basis of letting the terrorist know that there is a presence and therefore deterring them from carrying out acts of terrorism or being involved in terrorist-related activity. Compare this with the control order regime and TPIMs or ETPIMs – terrorist suspects will know they are being monitored – knowing they are under observations, such preventative measures may possibly deter the suspect from being involved in or engaging with terrorism whilst they are subject to such measures. As explained within Chapter Five and this chapter, making the terrorist suspect aware that they are being monitored creates a greater risk because it limits the government and security services' ability to obtain any intelligence which identifies other suspects or terrorist plans as well as impedes their ability to collect evidence to secure convictions. This is evident from the fact that during the lifetime of the control order regime (2005 – 2011) no controlee was successfully convicted. This is further supported by the Report of Anderson (2014) given that for 18 months no new TPIM notice was issued and the scheme itself may have had a disruptive effect to terrorist activity. Whilst disruption is a part of the CONTEST Strategy, it is a short term effect where as evidence-gathering to secure a conviction is a long-term effect and part of the 2011 Security

⁷⁶⁴ HM Government (fn 14).

Strategy. Identifying that terrorist activity has been disrupted, does not meet the long-term aim of the Security Strategy meaning the aim of the strategy is not supported.

Secondly, when looking at DWA the removal of terrorist suspects from the UK reduces the UK's opportunity to again monitor the suspect, their behaviour and their actions and control or manage the threat they pose. As explained in Chapter Four, deportation of suspects removes the UK's ability to manage and control this threat; this is similar to the first point raised above and is applicable to the other counterterrorist measures examined in this thesis.

Inevitably the 2011 Strategy cannot meet its aims to 'Pursue, Prevent, Protect and Prepare'. Despite this, Gomis (2013a) explained that the opinion of the Director General of MI5, Jonathan Evan is misplaced when he stated that "[t]he fact that there have been no successful al Qaeda related terrorist attacks in Britain since 2005 is the result of a great deal of hard and creative work by the security, intelligence and Police services".⁷⁶⁵ The security services are known to have identified 2,000 terrorists; yet, few have been subjected to any form of counter terrorism measure or prosecution. These concerns must also be considered alongside the risks discussed in each chapter, as well as the effectiveness assessments discussed earlier in this chapter. Alternatively, the UK strategy should focus more on arms-length measures which support the investigation and intelligence/evidence gathering processes so that the same may be strengthened. Within any counter-terrorism measure adopted by the UK, they should take the advice given by the International Commission of Jurists (2009) and 'ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work'.⁷⁶⁶ UK counter-terrorism measures should not cause long-term risks such as social isolation; otherwise there is a possibility that suspects or their families may be open to radicalisation and without a strong deradicalisation and rehabilitation programme, such counter-terrorism measures will continue to face the same risks, which show the measures to be disproportionate and ineffective.

⁷⁶⁵ Anderson QC (fn 47).

⁷⁶⁶ International Commission of Jurists (fn 65).

Whilst post-9/11 pre-emptive and preventative counter-terrorism measures may be concluded as being disproportionate, ineffective and unsupportive of UK Strategy 2011 aims, this has only been possible through the extensive assessment of the tri-relationship. This thesis has demonstrated that the holistic approach of assessing counter-terrorism measures, their impact on human rights and the interaction of risk, is the only way that the courts can determine whether a measure is Convention compliant and whether the measures work. One may suggest that the long discussion of national security versus human rights has been the wrong approach; risk assessment is a balanced factor which examines both sides of the debate. For these reasons one would argue that the tri-relationship identified in this thesis should be adopted when assessing counter-terrorism measures.

Word Count: 101, 691

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